Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

David W. Oakley,
Petitioner,

v.

State of Wisconsin.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and in what circumstances the government may prohibit a defendant from having children as a condition of probation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David W. Oakley respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court in this case.

OPINIONS BELOW

The Wisconsin Supreme Court's opinion is published at 629 N.W.2d 200 and its order on rehearing (Pet. App. 1a-4a) is published at 635 N.W.2d 760. The appendix (at 5a-40a) reproduces the court's opinion as amended on rehearing. The Wisconsin Court of Appeals' opinion (*id.* 41a-45a) is unpublished and is noted at 619 N.W.2d 308 (table). The judgment of conviction of the Circuit Court of Manitowoc County (Pet. App. 46a-48a) is unpublished.

JURISDICTION

The Wisconsin Supreme Court issued its opinion on rehearing on November 23, 2001. Justice Stevens subsequently extended the time to file this petition to and including April 19, 2002. See App. No. 01-612. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1.

The Wisconsin statute governing the imposition of conditions of probation provides in relevant part: "The court may impose any conditions which appear to be reasonable and appropriate." Wis. Stat. 973.09(1)(a).

STATEMENT

This case lies at the intersection of two competing lines of precedents – those holding that courts have significant discretion to impose probation conditions, and those holding that

restrictions on the fundamental right to procreate are subject to the strictest scrutiny. Long ago, this Court recognized that, "[t]o accomplish the purpose of [probation], an exceptional degree of flexibility in administration is essential." *Burns* v. *United States*, 287 U.S. 216, 220 (1932). But this Court has held just as clearly that a State's action to "prohibit the decision" to have a child "may be justified only by a 'compelling state interest' and must be narrowly drawn to express only the legitimate state interests at stake." *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 688 (1977) (quotation marks and alterations omitted).

The probation condition in this case exemplifies the state courts' increasing tendency to exercise their probationary powers to forbid procreation, as well as the ongoing conflict in the appellate courts over the scrutiny to which such extreme measures must be subject under the U.S. Constitution. Petitioner pleaded no contest to charges that, for a single four-month period during which he was unemployed, he intentionally failed to pay child support. A Wisconsin trial judge not only sentenced petitioner to a three-year prison term but also *sua sponte* prohibited him, as a condition of his further five-year term of probation, from having any additional children unless and until he first proves to the court's satisfaction that he will support his previous children and any newborn. No state legislature in the Nation has adopted such an extraordinary sanction. Nonetheless, the Wisconsin Supreme Court, dividing four-to-three, sustained the probation condition as constitutional, with the majority and dissent split over both the appropriate degree of scrutiny and the result.

Certiorari is warranted to provide needed guidance on this question, particularly in light of the "grave and substantial constitutional questions" (*Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942)) raised by the decision below.

1. Petitioner David Oakley has nine children and, at the time relevant to this petition, had accumulated a child-support arrearage of twenty-five thousand dollars.[1] The State has

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[1] Without attempting to suggest that the arrearage is not substantial, petitioner notes that a very large proportion of the amounts owed arose

imprisoned him for various offenses over time, but none involved endangering his children. Nor has he ever been adjudged an unfit parent. Furthermore, although petitioner is uneducated and impoverished, he indisputably has made substantial efforts to comply with his child-support obligations, having paid seventy percent of the amounts he owes.

This case arises from a period subsequent to petitioner's release from state prison in 1998, a time during which he was unemployed. The State charged him with intentionally failing to pay child support for four months and, in January 1999, he pleaded no contest to three counts of that offense in the Circuit Court for Manitowoc County. Pet. App. 7a.[2] At sentencing, the State sought a six-year prison term while petitioner requested that the court allow him to secure full-time employment to provide for his children. *Id.* The trial judge sentenced petitioner to three years in prison on the first count (*id.* 48a), imposed and stayed an eight-year prison term on the other two counts, and imposed a five-year term of probation to follow incarceration (*id.* 46a).

The court not only ordered that petitioner "be employed full-time" as a condition of his probation, but also *sua sponte* ordered that

> you not have any further children while you're on probation unless you can demonstrate you have the ability to support them and have been consistent in your support of the children that you already have. That means you'll have to come into court and say,

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from "birth expenses" and interest, as opposed to a persistent refusal to pay ongoing support.

[2] See also Pet. App. 46a, 48a (judgment of conviction: offense limited to 120-day period); *id.* 7a ("At sentencing * * * * [t]he State noted that *during the relevant time period*, Oakley had paid no child support and that there were arrears in excess of $25,000." (emphasis added)); *id.* 3a (opinion of Abrahamson, C.J.) ("According to the record, any persistent and stubborn refusal to pay child support is limited to the single 120-day period, that is, January 1, 1998, to April 30, 1998, for which he was charged and convicted."); *id.* ("The State does not challenge Oakley's statement of the facts about his support payments.").

> Judge, I think you should change that order and here's why.

Jan. 13, 1999 Trans. at 30. The trial judge imposed this condition knowing that petitioner would be unable to satisfy it. Indeed, the judge expressly acknowledged that petitioner's child-support arrearage would only grow over the course of his prison term, during which petitioner would not "be in a position to pay any meaningful support for [his] children." *Id.* at 43. And even after petitioner's release, "it would always be a struggle to support these children and in truth [he] could not reasonably be expected to fully support them." *Id.* 50.

The judge's analysis of petitioner's fundamental right to procreate was straightforward: "if you think I'm trampling all over your constitutional rights, so be it." Jan. 13, 1999 Trans. at 30.[3]

2. Petitioner challenged the probation condition as violative of the Fourteenth Amendment of the U.S. Constitution (see Pet'r Wis. C.A. Br. 5-7 (citing *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)); Pet'r Wis. S. Ct. Br. 5-9 (citing, *inter alia*, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978)) and both the state court of appeals (Pet. App. 41a-45a) and state supreme court (*id.* 5a-40a) expressly rejected those arguments. See S. Ct. R. 14(g)(i).

a. The Wisconsin Court of Appeals rejected petitioner's constitutional challenge to the condition. Pet. App. 44a-45a. The court adopted the trial judge's finding that petitioner is "unable to support his current children and [is] unlikely to be able to fully support them in the future." *Id.* 44a. On this view, the condition "merely prohibits Oakley from having additional children whom he cannot support." *Id.*

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[3] The trial judge concluded that "a line has to be drawn" and "we have to take a stand." Jan. 13, 1999 Trans. at 25. "And at some point we have to make hard decisions and we can't compromise all of these competing goals that we have here." *Id.* The judge concluded that "[t]here's [sic] a lot of people in Mr. Oakley's situation," and that "there's a message that gets sent out to people." *Id.* at 25-26.

b. A bitterly divided Wisconsin Supreme Court affirmed. Pet. App. 5a-40a. At the outset, the majority concluded that the case was controlled by its prior holding that "'conditions of probation may impinge on constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation.'" Pet. App. 8a (quoting *Edwards* v. *State*, 246 N.W.2d 109, 111 (1976)). The majority rejected petitioner's argument that the probation condition was subject to strict scrutiny, believing that "it would necessarily follow that the more severe punitive sanction of incarceration * * * would likewise be subjected to strict scrutiny analysis." *Id.* 3a.

In support of that proposition, the majority cited various decisions applying a "reasonableness" standard to uphold probation conditions indirectly impinging upon constitutional rights. *Id.* 19a-22a n.27 (citing, *e.g.*, *United States* v. *Bolinger*, 940 F.2d 478, 480 (CA9 1991) (prohibiting defendant, convicted of being felon in possession of firearm, from consorting with motorcycle gang); *State* v. *Miller*, 499 N.W.2d 215, 216 (Wis. App. 1993) (prohibiting probationer convicted of making harassing telephone calls from telephoning women without permission from probation officer)). The majority opined that few precedents supported its decision because "parole conditions infrequently face appellate review" given that "criminal defendants, facing the more punitive alternative of incarceration, are generally unwilling to appeal conditions of their probation" because they lack sufficient "mettle." Pet. App. 17a n.24.

On the majority's view, any condition abrogating a fundamental federal constitutional right need only satisfy the standard set by state law, under which "[t]he court may impose any conditions which appear to be reasonable and appropriate" (Wis. Stat. § 973.09(1)(a)). The majority emphasized that this standard "grants a circuit court judge broad discretion in fashioning a convicted individual's conditions of probation." Pet. App. 12a.

The majority concluded that a probation condition forbidding procreation was appropriate in this case, which involved "an intentional unwillingness to pay child support by a

man with a prior criminal record." Pet. App. 1a.[4] The majority embraced the state court of appeals' view that petitioner must be cured of his "cavalier attitude toward the justice system" by correcting what the court perceived as "his perception that one may flout valid court orders and the judicial process with impunity and suffer no real consequences." *Id.* 14a. The majority opined that the condition in this case is not overly broad because it expires after five years and furthermore would be satisfied by petitioner "not intentionally refusing to support his current nine children and any future children as required by law." *Id.* 23a. Although the majority refused to subject the condition to strict scrutiny, it nonetheless characterized the condition as narrowly tailored to the State's compelling interests in "having parents support their children" and "rehabilitating [petitioner] through probation rather than prison," reasoning that the alternative of incarceration "would have further victimized his children" and would have represented a "more punitive option." *Id.* 23-24a.

c. The three dissenters joined two opinions. See Pet. App. 29a-40a. In her dissent, Justice Bradley argued that the probation condition is subject to strict scrutiny because it directly prohibits petitioner from exercising his fundamental right to procreate, which is "a 'basic liberty' that is 'fundamental to the very existence and survival of the [human] race'" (Pet. App. 30a (quoting *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942)) and "is central to the zone of privacy protected by the Constitution" (*id.*).

Justice Bradley found persuasive a decision of the California Court of Appeals rejecting a similar probation condition that was imposed in the more extreme circumstance of a mother who endangered her children by refusing to provide

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[4] The "three convictions, and four read-ins, for intentional refusal to pay child support" referenced by the majority (Pet. App. 1a) are all encompassed by this case. Petitioner's conviction for witness intimidation, which the majority below referenced only briefly (see *id.* 14a), arose from a single statement by petitioner at a time when he was upset that he was being prosecuted on a charge that was meritless and that was later dismissed.

them with proper nutrition (*People* v. *Pointer*, 199 Cal. Rptr. 357 (1984)), as well as a decision of the Eighth Circuit rejecting a similar condition imposed on a defendant convicted of a drug offense (*United States* v. *Smith*, 972 F.2d 960 (1992)). Based on those decisions, Justice Bradley rejected the argument that, because the State could impose the more extreme sanction of imprisonment, less rigorous scrutiny automatically applies even to a probation condition directly impinging on the fundamental right to procreate: "[T]he fact of the matter is that Oakley has not been imprisoned. He is a probationer and has retained a degree of his liberty, including 'a significant degree of privacy under the Fourth, Fifth and Fourteenth Amendments.'" Pet. App. 33a (quoting *Pointer*, 199 Cal. Rptr. at 363). Furthermore, the majority's analysis of the State's interests failed to account for the dilemma that would be created if a woman were to become pregnant by petitioner, a circumstance that could be "'coercive of abortion'": Because the condition "will not be violated until the woman with whom he has sexual relations carries her pregnancy to term," it "places the woman in an untenable position: have an abortion or be responsible for Oakley going to prison for eight years." *Id.* 36a (quoting *Pointer*, 199 Cal. Rptr. at 366). Finally, the condition is effectively unworkable – because it cannot be enforced "[s]hort of having a probation officer follow [petitioner] twenty-four hours a day" (*id.* 35a (quoting *Smith*, 972 F.2d at 962)) – but rather amounts to nothing more than "a judicially-imposed 'credit check' on the right to bear and beget children" (*id.* 35a).

In her separate dissent, Justice Sykes similarly deemed the probation condition "basically a compulsory, state-sponsored, court-enforced financial test for future parenthood," which she concluded could not be sustained even under a less rigorous "reasonableness" standard. Pet. App. 38a. In sum, she explained, there is "no authority for the proposition that the State can order that a child not be conceived or born, even to an abysmally irresponsible parent, unless the State first grants its consent." *Id.* 40a.

Justice Sykes did not dispute the State's compelling interest in requiring parents to support their children, but reasoned that

the condition in this case is overly broad in light of *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), in which this Court struck down a Wisconsin statute barring noncustodial parents from marrying unless they first prove they have satisfied any child-support arrearages. The *Zablocki* Court emphasized that the State could further its legitimate interests through alternative means, such as "wage assignments, civil contempt proceedings, and criminal penalties." 434 U.S. at 389-90. See also Pet. App. 32a-33a (dissent of Justice Bradley similarly relying on *Zablocki*).[5] Here, Justice Sykes explained, the State could similarly require petitioner to serve time in jail while earning money for child support through work release, or to maintain two full-time jobs while the State garnishes his wages; the State also could revoke petitioner's parole for failing to pay child support, or could institute further criminal proceedings. Pet. App. 39a. But the trial judge had neither employed nor even explored those options. *Id.*

5. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons. First, the Wisconsin Supreme Court's holding that a probation condition forbidding procreation is not subject to strict scrutiny conflicts with decisions of other appellate courts and with this Court's precedents, including particularly *United States* v. *Knights*, 534 U.S. 112 (2001), which establish that probation conditions do not constitute a special class of governmental actions insulated from regular constitutional scrutiny. Second, the Wisconsin Supreme Court's holding that the probation condition at issue here is, in any event, narrowly tailored to further a compelling state interest similarly conflicts with decisions of other appellate courts and with this Court's precedents, including particularly *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), which conclude that other alternatives can better fulfill the State's interests. Third, this case presents an unique opportunity to decide the question

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[5] By contrast, the majority concluded that *Zablocki* "is not implicated here for the simple reason that the test" applied in that case was "strict scrutiny." Pet. App. 16a n.23.

presented because anti-procreation probation conditions (although frequently imposed) are rarely appealed by defendants who fear that they will be imprisoned if their appeals succeed, and because the record and decisions in this case are particularly well developed.

I. Certiorari Should Be Granted To Review The Wisconsin Supreme Court's Holding That A Probation Condition Forbidding Procreation Is Not Subject To Strict Scrutiny.

A. The split within the Wisconsin Supreme Court over the level of scrutiny applicable to probation conditions forbidding procreation mirrors a broader conflict in the lower courts.

1. The condition of probation in this case "subjects [petitioner] to imprisonment if he fathers another child without advance permission from the State." Pet. App. 40a (Sykes, J., dissenting). A number of courts have held that such conditions are subject to heightened scrutiny, expressly rejecting the "reasonableness" standard accepted by the majority below. Thus, in *United States* v. *Smith*, 972 F.2d 960 (1992), which arose from a drug conviction, the Eighth Circuit invalidated a probation condition forbidding the defendant from fathering children out of wedlock unless he first proved he was supporting his existing children. The court of appeals recognized that a probation condition is generally sustained if it "fosters rehabilitation of the defendant and protection of the public" (972 F.2d at 961 (citations and internal quotation marks omitted)) but emphasized that the "'right to have offspring' is a 'sensitive and important area of human rights'" (*id.* at 962 (quoting *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942))) such that "'[c]onditions [which] restrict a probationer's freedom must be especially fine-tuned'" (*id.* (quoting *United States* v. *Tolla*, 781 F.2d 29, 34 (CA2 1986)).[6]

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[6] Cf. *United States* v. *Sofsky*, No. 01-1097, 2002 U.S. App. LEXIS 5148, at *7 (CA2 Mar. 28, 2002) (invalidating condition of supervised release that prohibited defendant, convicted of receiving child

Similarly, in *People* v. *Pointer*, 199 Cal. Rptr. 357 (1984), the California Court of Appeals invalidated a probation condition prohibiting pregnancy by a mother convicted of felony endangerment of her two children. The court acknowledged that the condition would be sustained under a "reasonableness" test (199 Cal. Rptr. at 364), but held that, because it "infringes the exercise of a fundamental right to privacy," such an anti-procreation condition "must be subjected to special scrutiny to determine whether the restriction is entirely necessary to serve the dual purposes of rehabilitation and public safety" (*id.*). See also *People* v. *Zaring*, 8 Cal. App. 4th 362, 372 (App. 1992) (applying *Pointer* to invalidate probation condition prohibiting pregnancy by defendant convicted of felony heroin possession).

And in *State* v. *Mosberg*, 768 P.2d 313 (1989), the Kansas Court of Appeals invalidated a probation condition prohibiting pregnancy by a mother who pleaded no contest to endangering her two-hour-old baby by leaving her in a stranger's unlocked car. The court reasoned that, although trial courts possess significant discretion in imposing probation conditions, "[t]here are * * * limitations on probation conditions that infringe on constitutionally protected rights." *Id.* at 314. That is particularly true of a prohibition on having a child, the court concluded, because "decisions regarding conception lie within the sphere of choices protected by constitutional rights to privacy." *Id.* (citing *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977)).

2. Conversely, other courts agree with the majority below and hold that such a probation condition, like any other, will be sustained so long as it is reasonably related to the State's interest in protecting the public and rehabilitating the defendant. It bears emphasizing, however, that in all but one case the courts relying on this test *invalidated* conditions prohibiting procreation. See *infra* at 19. The lone exception, *State* v. *Kline*, 963 P.2d 697

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pornography, from using computer or Internet without probation officer's approval; court notes that, although sentencing judge has "broad" discretion in imposing conditions, it will "'carefully scrutinize unusual and severe conditions'" (quoting *United States* v. *Doe*, 79 F.3d 1309, 1319 (CA2 1996)).

(Or. App. 1998), which is the decision principally invoked by the majority below (see Pet. App. 17a-18a), arose from a father's criminal mistreatment of his children through violent abuse. In revoking the father's probation on the mistreatment charge, the court imposed a further condition that he not father additional children until he first demonstrated that he had completed drug treatment and anger management programs, as well as counseling. 963 P.2d at 699. The court of appeals sustained the condition under a "reasonableness" analysis, rejecting the defendant's argument that heightened scrutiny applied. *Id.*

A similar test was applied in *People* v. *Dominguez*, 256 Cal. App. 2d 623, 627 (1967), in which the California Court of Appeals invalidated such a condition forbidding procreation under a three-part reasonableness test: "A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid." Although the California courts have subsequently applied a heightened degree of scrutiny (see *supra* at 9-10), the *Dominguez* standard has been applied by courts in Florida, Louisiana, and Ohio to invalidate similar probation conditions.[7]

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[7] See, *e.g.*, *Rodriguez* v. *State*, 378 So. 2d 7 (Fla. App. 1979) (applying three-part *Dominguez* test and invalidating probation condition prohibiting defendant, who had pleaded no contest to a charge of aggravated child abuse, from becoming pregnant); *State* v. *Norman*, 484 So. 2d 952 (La. App. 1986) (relying on three-part test virtually identical to *Dominguez* test to invalidate similar condition as applied to defendant convicted of forgery); *State* v. *Livingston*, 372 N.E.2d 1335, 1337 (Ohio App. 1976) (relying on *Dominguez* test to strike down similar condition as applied to defendant convicted of child abuse after placing her infant child on a space heater). See also *infra* at 19 (citing additional cases).

B. The Wisconsin Supreme Court's refusal to subject the probation condition at issue in this case to heightened scrutiny conflicts with *United States* v. *Knights*.

1. The majority below placed exceptional weight on decisions applying a "reasonableness" analysis to sustain probation conditions that impinge on various constitutional rights. See Pet. App. 19a-22a n.27. For example, courts commonly restrict probationers from leaving the state, a restriction on the right to travel interstate. Neil P. Cohen, THE LAW OF PROBATION AND PAROLE § 10:1 (2d ed. 1999). Courts also have sustained a condition that limits free speech by prohibiting a defendant convicted of making harassing telephone calls from telephoning women without permission from his probation officer (*State* v. *Miller*, 499 N.W.2d 215, 216 (Wis. App. 1993)), as well as a condition that limits association by prohibiting a person convicted of being a felon in possession of a firearm from consorting with a motorcycle gang (*United States* v. *Bolinger*, 940 F.2d 478, 480 (CA9 1991)).

The majority below extrapolated from these decisions the proposition that *every* condition of probation that abrogates *any* fundamental right will be sustained so long as it satisfies the state-law "reasonableness" test. See Pet. App. 19a. On that view, the same state law standard that governs probation conditions which pose no substantial threat to constitutional liberties – such as a condition requiring the defendant to "get a haircut" or "write an essay" (Cohen, *supra*, §§ 14:12, :22) – applies equally to a condition requiring a defendant to give up his Sixth Amendment right to counsel in any offense arising during probation, or providing that such an offense would be tried under a preponderance standard rather than by proof beyond a reasonable doubt. It would similarly govern a condition forbidding a woman to have a first-trimester abortion or forbidding a probationer from practicing his religion.

The reasoning of the majority below cannot be correct. The state law question – governed by the "reasonableness" standard – whether a particular probation condition has been properly imposed in a particular case cannot properly be conflated with the antecedent question whether the type of condition imposed is

constitutional. Put another way, the Constitution does not contain an implied "probation exception." To be sure, the context of probation informs the constitutional analysis. But that is nothing new. For few constitutional provisions are absolute; some "constitutional rights" may generally be overcome when necessary to further a sufficiently important governmental interest, while other rights are subject to a balancing of individual and governmental interests. The majority below thus derived altogether the wrong principle from the examples it cited: a state may prohibit telephone calls by a serial harasser or limit a probationer's continued association with a gang based on the substantial governmental interest in prohibiting continued criminality in those circumstances. The "reasonableness" standard provides a judge familiar with the facts of a particular case with the flexibility to tailor an otherwise constitutional class of conditions to the particular defendant.

This Court's most recent decision concerning probation conditions, *United States* v. *Knights*, 534 U.S. 112, 122 S. Ct. 587 (2001), confirms that a probation condition impinging on a federal constitutional right is not subject to a special, less rigorous standard. The question before this Court in *Knights* was the degree of Fourth Amendment scrutiny applicable to a search of a person who was subject to a probation condition permitting searches of his person and property "'with or without a search warrant, warrant of arrest or reasonable cause.'" 122 S. Ct. at 589. This Court agreed that the condition satisfied the "reasonableness" standard set by state law: "It was reasonable to conclude that the search condition would further the two primary goals of probation – rehabilitation and protecting society from future criminal violations." *Id.* at 591 & n.5 (citing *People* v. *Lent*, 541 P.2d 545, 548 (Cal. 1975)). But this Court did *not*, contrary to the Wisconsin Supreme Court's decision in this case, deem the state statutory standard determinative of the federal constitutional question. In particular, this Court notably did not hold that a search could be conducted, as the condition provided, "without * * * reasonable cause." *Id.* at 592 n.6.

Instead, this Court in *Knights* held the probation condition subject to the "general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance." 122 S. Ct. at 591 (citation omitted). See also *id.* at 593 ("our holding rests on ordinary Fourth Amendment analysis").[8] "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 591 (citation omitted). "Knights's status as a probationer," the Court explained, "informs both sides of the [Fourth Amendment] balance." *Id.* The valid probation condition "significantly diminished Knights's reasonable expectation of privacy." *Id.* at 592. In addition, the condition furthers a governmental interest in reducing recidivism because "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal." *Id.* The Court held "that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house." *Id.*

2. The Wisconsin Supreme Court's holding that the probation condition in this case was valid so long as it satisfied the "reasonableness" standard set by state law flatly conflicts with this Court's decision in *Knights*. Unlike the right of physical privacy embodied in the Fourth Amendment, which turns on a case-by-case inquiry into "reasonableness," the right of procreation protected by the substantive component of the Fourteenth Amendment's Due Process Clause is binary in nature: no woman can be a "little bit" pregnant, and no man can "more or less" father a child. Accordingly, the right to procreate cannot be rendered a partial or half-way right by a context such

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[8] See also *Ferguson* v. *City of Charleston*, 532 U.S. 67, 80 n.15 (2001) (explaining that *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), which sustained a probation search under the Fourth Amendment "special needs" doctrine, "is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large").

as probation. Because the power to incarcerate does not entail the power to manipulate reproductive behavior (see *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)), action by the state to "prohibit the decision" to have a child "may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake" (*Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 688 (1977) (quotation marks and alterations omitted)).

Even a convicted criminal's right to procreate falls within the category of rights whose restriction triggers strict scrutiny because it fundamentally marks one as a person, empowered to control one's destiny and that of one's family. Procreation thus "is at the very heart" of the personal rights protected by the Constitution, for it "by definition concerns the most intimate of human activities and relationships." *Carey*, 431 U.S. at 685. Most fundamentally, the prerogative to procreate stands as a bulwark against the most dangerous sort of social engineering by those who wield government power at any moment in time. As this Court said six decades ago, "[i]n evil or reckless hands," the power to forbid or restrict procreation "can cause races or types which are inimical to the dominant group to wither and disappear." *Skinner*, 316 U.S. at 541. Thus, although this Court once endorsed forced sterilization of the mentally retarded on the view that "[t]hree generations of imbeciles are enough" (*Buck* v. *Bell*, 274 U.S. 200, 207 (1927)), that era has passed and the Court has subsequently held, and repeatedly reaffirmed, that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972).

3. Contrary to the Wisconsin Supreme Court's view that its decision was supported by the broad discretion inherent in a trial judge's decision to impose probation (Pet. App. 12a), that factor only reinforces the need to apply strict scrutiny to a condition prohibiting procreation. This Court's precedents confirm that statutes conferring such "breathtakingly broad" (*Troxel* v. *Granville*, 530 U.S. 57, 67 (2000) (plurality)) authority are of

greater, not lesser, concern when the judge's discretion includes the power to abrogate independently fundamental constitutional rights. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Eisenstadt*, 405 U.S. at 454 (quoting *Railway Express Agency* v. *New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).[9] Thus, in *Troxel*, the principal constitutional infirmity in Washington State's grandparent visitation statute was that it "place[d] the best-interest [of the child] determination solely in the hands of the judge," who could "disregard and overturn any decision by a fit custodial parent." 530 U.S. at 67 (plurality). See also *id.* at 79 (Souter, J., concurring) ("It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.").

Neither the Wisconsin probation statute (Wis. Stat. 973.09) nor the decision below sets any constraints on the discretion of a trial judge to impose a ban on procreation for failure to pay child

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[9] See also, *e.g.*, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972) (invalidating anti-vagrancy ordinance, Court explains that "[w]here, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940))); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969) (ordinance providing city council with "virtually unbridled and absolute power to prohibit" parades or demonstrations "fell squarely within the ambit of the many decisions of this Court * * * holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority[] is unconstitutional"); cf. *City of Chicago* v. *Morales*, 527 U.S. 41, 60 (1999) (noting that "broad sweep" of city anti-loitering ordinance violates 'the requirement that a legislature establish minimal guidelines to govern law enforcement'" (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983))).

support – beyond the statutory requirement that the condition be "reasonable." As in *Troxel*, the judge is not required to find "any special factors that might justify the State's interference with [this] fundamental right." 530 U.S. at 68 (plurality). Wisconsin law thus leaves the trial judge free to apply invidious or arbitrary criteria in eliminating the right of selected probationers to reproduce, with the result that, although two individuals may have essentially identical child-support arrearages, Wisconsin law permits judges to decide which to prohibit from having children based on the vaguest of gestalt impressions. And, because this specific power to impose such an extraordinary restriction on probationers is not even codified in any statute, the normal electoral checks on legislative excess are entirely ineffective. This case is accordingly controlled by *Skinner* v. *Oklahoma*, in which the Court deemed "strict scrutiny of the classification" permitting sterilization of certain repeat offenders to be "essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." 316 U.S. at 541.[10]

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[10] For example, given the emphasis of the majority below on the fact that petitioner has nine children, the wide discretion afforded to judges in imposing probation conditions creates the potential for discrimination against certain discrete groups who tend to have disproportionately large families. See, *e.g.*, Lisa Bertagnoli, *Perceptions of Mormon Women Miss the Mark, Some Experts Say*, CHI. TRIB., Feb. 13, 2002, at C1 (birth rate for Mormons 50% higher than national norm); Jeff Kunerth, *U.S. Fertility Rate Rebounds*, ORLANDO SENTINEL, Feb. 13, 2002, at A1 (in 2000, fertility rate for Hispanic women in U.S. was 3.1 children per woman; national average was 2.1 children).

The rationale of the majority below also opens the door to discrimination against the poor. In the U.S., there are nearly 2.5 million noncustodial fathers who do not pay child support and are themselves extremely poor. See Elaine Sorensen & Chava Zibman, *Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?* (Urban Institute, Washington, DC), Apr. 2001, at 1. Twenty-nine percent – approximately 725,000 – of these poor, noncustodial fathers are institutionalized. *Id.* at 2. The remaining fathers face significant barriers in obtaining employment: 43% lack a high school or general equivalency diploma, approximately one-third have not held a job for more than three years, and

The prospect of disparate treatment is further enhanced by the requirement that petitioner secure the trial judge's *permission* in order to have a child – coupled with no requirement that the trial judge articulate with any specificity the circumstances in which the probation condition would be lifted – a failure that conspicuously marked the trial judge's ruling below. The entire scheme is rife with indeterminacy.[11]

Because the Wisconsin Supreme Court's holding that a probation condition directly abridging the fundamental right to procreate is not subject to heightened judicial scrutiny conflicts with decisions of other courts and with this Court's precedents, certiorari should be granted.

II. Certiorari Should Be Granted To Review The Wisconsin Supreme Court's Holding That A Probation Condition Forbidding Procreation Is Constitutional Because It Sufficiently Furthers A Compelling State Interest.

A. The Wisconsin Supreme Court's judgment conflicts with decisions of other courts and with this Court's precedents.

Although the majority below held that a probation condition abrogating a fundamental constitutional right is never subject to strict scrutiny, it opined that a ban on procreation is narrowly tailored to the State's compelling interests in "having parents support their children" and "rehabilitating [petitioner] through probation rather than prison" because, among other things, the alternative of incarceration "would have further victimized his children" and would have represented a still "more punitive option." *Id.* 24a. A similar probation condition has been sustained by another appellate court only *once*, and that decision cannot be fairly read to support the decision below. In *State* v.

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one-third do not have a telephone. *Id.* The average personal salary for the poor noncustodial fathers who do work is $5,627 *per year*. *Id.* at 3.

[11] This profound indeterminacy should raise serious concerns even for those Justices who take the view that the protections of the Due Process Clause are principally procedural, not substantive.

Kline, 963 P.2d 697, 699 (Or. App. 1998), the defendant had been convicted of viciously abusing his children – causing a spiral fracture of a baby's leg and breaking another child's arm, in the latter case resulting in the termination of his parental rights. The trial court imposed a probation condition tailored to those circumstances, requiring the defendant, prior to having any additional children, to complete "a drug treatment program and anger management program and any other program directly related to counseling related to * * * [his] conduct towards children." 963 P.2d at 699. As the Oregon Court of Appeals later recounted, the trial court imposed the condition only after a careful review of "the facts of this case, defendant's background, his previous failure to comply with probation conditions, and the availability and appropriateness of alternative probation conditions." *Id.*

Other courts, typically in far more extreme circumstances than petitioner's case, have uniformly held similar probation conditions that restrict procreation to be unconstitutional. See *United States* v. *Smith*, 972 F.2d 960 (CA8 1992) (condition that prohibited defendant from fathering additional children outside of marriage unless he could demonstrate that he was fully supporting his existing children); *People* v. *Zaring*, 8 Cal. App. 4th 362 (App. 1992) (no-pregnancy condition); *People* v. *Pointer*, 199 Cal. Rptr. 357 (App. 1984) (no-pregnancy condition); *People* v. *Dominguez*, 256 Cal. App. 2d 623 (App. 1967) (condition prohibiting defendant from becoming pregnant outside of marriage); *Thomas* v. *State*, 519 So. 2d 1113 (Fla. App. 1988) (condition prohibiting defendant from becoming pregnant outside of marriage); *Howland* v. *State*, 420 So. 2d 918 (Fla. App. 1982) (condition prohibiting defendant from fathering any children); *Burchell* v. *State*, 419 So. 2d 358 (Fla. App. 1982) (per curiam) (condition prohibiting defendant from fathering any children); *Wiggins* v. *State*, 386 So. 2d 46 (Fla. App. 1980) (condition prohibiting defendants from having sexual intercourse outside marriage); *Rodriguez* v. *State*, 378 So. 2d 7 (Fla. App. 1979) (no-pregnancy condition); *State* v. *Ferrell*, 659 N.E.2d 992 (Ill. App. 1995) (condition that prohibited defendant from engaging in any activity that could cause pregnancy;

invalidated on ground that condition violated state statute precluding courts from mandating the use of birth control), *pet. for leave to appeal denied*, 664 N.E.2d 644 (Ill. 1996); *Trammell* v. *State*, 751 N.E.2d 283 (Ind. App. 2001) (no-pregnancy condition); *State* v. *Mosburg*, 768 P.2d 313 (Kan. App. 1989) (no-pregnancy condition); *State* v. *Norman*, 484 So. 2d 952 (La. App. 1986) (condition that prohibited defendant from having children out of wedlock); *State* v. *Richard*, 680 N.E.2d 667 (Ohio App. 1996) (condition requiring defendant either to use birth control or have tubal ligation); *State* v. *Livingston*, 372 N.E.2d 1335, 1337 (Ohio App. 1976) (no-pregnancy condition).

The judgment below also cannot be reconciled with the obvious force of this Court's precedents, which (apart from *Buck* v. *Bell*, 274 U.S. 200, 207 (1927)) have never sustained a measure that so directly impinges on the right to procreate. Thus, in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), this Court struck down a state statute providing for the sterilization of certain classes of "habitual criminals," explaining that the statute "involve[d] one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." In three subsequent cases, this Court invalidated measures that restricted access to contraception, which manifestly were less intrusive on the right to procreate than the probation order in this case. Thus, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), struck down a ban on the use of contraceptives by married couples. Subsequently, *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), extended *Griswold* to a statute applicable to unmarried persons, explaining that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." And *Carey* v. *Population Services International*, 431 U.S. 678, 685-86 (1977), similarly struck down a statute forbidding any person to distribute contraceptives to minors and permitting only pharmacists to sell nonprescription contraceptives to adults, holding that, although not every regulation related to fundamental rights of privacy is "automatically invalid[],"

"where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on [that decision] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[12]

B. Certiorari specifically is warranted with respect to the Wisconsin Supreme Court's "narrow tailoring" analysis.

Assuming that the majority below was correct that the probation condition in this case seeks to further a compelling state interest,[13] its further holding that the condition is "narrowly tailored" to fulfill that interest is insupportable. In particular, the majority's narrow tailoring analysis conflicts squarely with *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), in which this Court struck down a Wisconsin statute that required residents who were responsible for the support of children with whom they did not live to obtain court approval before marrying. Court approval was granted only if the applicant demonstrated both that his support obligations had been met in the past and that his children were not then, and were not likely to become, public charges.

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[12] Because no countervailing state interest akin to the interest in fetal life operates to yield an "undue burden" variant of heightened scrutiny here (cf. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1994) (plurality)), the degree to which that variant differs from standard strict scrutiny is not implicated by this case (cf. *id.* at 985 (Scalia, J., dissenting)).

[13] But see *People* v. *Dominguez*, 256 Cal. App. 2d 623, 628 (App. 1967) ("The burden upon the taxpayers to maintain illegitimate children at the public expense is a grave problem, but a court cannot use its awesome power in imposing conditions of probation to vindicate the public interest in reducing the welfare rolls by applying unreasonable conditions of probation. The interest of the public in saving money for the taxpayers is by no means the same thing as the public interest in the reformation and rehabilitation of offenders. Probation orders are not merely bookkeeping arrangements."). Courts have also invalidated probation conditions like those at issue in this case in part because they can be coercive of abortion. See *Zaring*, 8 Cal. App. 4th at 373; *Pointer*, 199 Cal. Rptr. at 366; *Mosburg*, 768 P.2d at 315; see also Pet. App. 33a (Bradley, J., dissenting).

In invalidating the statute, this Court began by emphasizing that the right to marry is one of the "personal decisions protected by the right of privacy" (434 U.S. at 384 (citing, *inter alia*, *Whalen* v. *Roe*, 429 U.S. 589, 598-600 (1977), and *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977))), "on the same level of importance as decisions relating to *procreation*, childbirth, child rearing, and family relationships" (*id.* at 386 (emphasis added)). Further, the Court explained, the statute "interfere[d] directly and substantially with the right to marry." *Id.* at 387. Some Wisconsin residents would never be able to obtain court approval to marry "because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges." *Id.* Others, although "able in theory to satisfy the statute's requirements," would "effect[ively] be coerced into forgoing their right to marry" as a result of the additional burdens imposed by the statute. *Id.* Finally, even those Wisconsin residents who seek and ultimately obtain court approval "suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental." *Id.* The Court explicitly rejected Wisconsin's argument that the approval requirement was justified because it "provides incentive for the applicant to make support payments to his children," explaining that "[t]his 'collection device' rationale cannot justify the statute's broad infringement on the right to marry." 434 U.S. at 389.

The Court's reasoning in *Zablocki* applies equally to the probation condition in this case. The Wisconsin Supreme Court's principal basis for sustaining the condition – that it would "protect the victims of Oakley's crimes - Oakley's nine children" (Pet. App. 15a) – suffers from the same logical flaw as the statute in *Zablocki*, which "merely prevent[ed] the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children" (434 U.S. at 389). Relatedly, just as the statute in *Zablocki* was "grossly *under*inclusive" to the extent it was intended to prevent marriage applicants from incurring financial obligations because it did "not limit in any way new financial commitments by the

applicant other than those arising out of the contemplated marriage" (*id.* at 390), so too the probation condition in this case does not restrict petitioner from incurring *any* other financial obligations.

Just as important, the "numerous other means" available in *Zablocki* to ensure compliance with child-support obligations that "are at least as effective as the instant statute's and yet do not impinge upon the right to marry," such as "wage assignments, civil contempt proceedings, and criminal penalties" (*id.* at 389-90), "still exist today" under Wisconsin law (Pet. App. 33a (Bradley, J., dissenting)). The Court deemed this the "[m]ost important[]" flaw in the statute in *Zablocki*. As the dissent of Justice Sykes cogently explained (Pet. App. 39a), the State could imprison petitioner while requiring him to earn money for child support through work release, or could require petitioner to maintain two full-time jobs while garnishing his wages. The State also could revoke petitioner's parole for failing to pay child support, or could simply institute further criminal proceedings. And the State itself could fashion additional sanctions that would not impinge so directly on fundamental rights.[14] Thus, in *United States* v. *Smith*, 972 F.2d

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[14] Indeed, there is virtually no limit to the types of less constitutionally intrusive sanctions that the federal government, states, and cities have adopted for failure to comply with child support orders. For some of the more novel examples, see, *e.g.*, *Lessons Learned From Welfare Overhaul: Hearings Before the Senate Comm. on Finance* (Mar. 12, 2002) (testimony of Secretary Tommy Thompson, Department of Health and Human Services) (describing program to deny passports to individuals with more than $5000 in child-support arrearages and noting that passports were being denied to 60 delinquent parents per day); Heidi Evans, *City's Deadbeat Dads' Hall of Shame*, DAILY NEWS, Feb. 3, 2002, at 6 (sanctions employed by New York City include suspension of driver's licenses, suspension of professional, business, or occupational licenses, seizure of lottery winnings, and freeze or seizure of bank accounts); Jenn Kostka, *Denver Prepared to Boot Deadbeat Parents' Cars*, DENVER POST, Mar. 20, 2002, at B7 (describing plan by Denver officials to place parking boots on cars of parents owing child support when alternate means, such as suspension of driver's licenses, have failed); *Deadbeat Parents to Lose Licenses*, TIMES-PICAYUNE (NEW ORLEANS), Jan. 13, 2002, at 5 (Louisiana law to allow state's Department of Social Services to order

960, 962 (1992), the Eighth Circuit held that "[a] probation condition that requires [the defendant] to find gainful employment and support his children is well within the district court's authority and, we believe, is more likely to produce the results that the district court intended."[15]

The majority held that the State was not required to use other methods of furthering its interests – "such as [a] wage assignment, lien on personal property, or civil contempt" – because petitioner "pled no contest to three counts" of intentionally refusing to pay child support and because petitioner acknowledges "that he 'cannot and probably will never have the ability to properly support [his] children.'" Pet. App. 24a n.30. But nothing about petitioner's intentional failure to pay child support for 120 days remotely suggests that *involuntary* measures of securing any assets he may have would be ineffective. The majority's alternative argument – that petitioner is abjectly poor and thus will have no assets to seize – merely confirms the dissent's point that the Wisconsin Supreme Court "allowed [petitioner's] right to have children to be conditioned upon financial status" (*id.* 36a).

The majority below also suggested that the trial judge was not obligated to consider these alternatives because most would involve imprisoning petitioner, an outcome that would similarly restrict his ability to procreate. But there is no merit to the court's attempt to invoke this "greater power includes the lesser"

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suspension of professional, sporting, and driver's licenses for parents who fail to pay child support for 90 or more days). Cf. Pet. App. 8a n.4 (noting Congress' adoption of Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187).

[15] The California courts have invalidated similar probation conditions on the ground that trial judges can protect the interests of children through more direct steps – including, if appropriate, taking the children into state custody. *People* v. *Zaring*, 8 Cal. App. 4th 362, 372 (App. 1992); *People* v. *Pointer*, 199 Cal. Rptr. 357, 365 (App. 1984). The Indiana Court of Appeals has concluded that such alternatives "offer a decisively more reasonable balance of the rehabilitative, constitutional, and law enforcement factors." *Trammell* v. *State*, 751 N.E.2d 283, 289-90 (2001).

syllogism, because the State's unquestioned power to imprison a criminal defendant (and thereby restrict as a practical matter his ability to procreate) most certainly does not confer the entirely separate power to ban him from procreating while in the civil population. An imprisoned individual's "incidental inability to exercise his procreative rights" (Pet. App. 33a (Bradley, J., dissenting)) arises from the defendant's "status as a prisoner or * * * the legitimate penological objectives of the corrections system" (*Turner* v. *Safley*, 482 U.S. 78, 95 (1987) (citation omitted)). As Justice Bradley recognized in her dissent in this case, "the fact of the matter is that Oakley has not been imprisoned. He is a probationer and has retained a degree of his liberty, including 'a significant degree of privacy under the Fourth, Fifth and Fourteenth Amendments.'" Pet. App. 33a (quoting *Pointer*, 199 Cal. Rptr. at 363). A straightforward example demonstrates the point: although a state may no doubt imprison a defendant for tax evasion, that fact does not confer the altogether different power to release that defendant but ban him from having children, even while on parole.[16]

A number of other factors buttress the conclusion that a probation condition forbidding procreation is not "narrowly tailored" to further any legitimate state interest. As the majority below explained, the Wisconsin legislature has specifically "attached severe sanctions to this crime," pursuant to which petitioner was already imprisoned. Pet. App. 10a. If States actually believed that forbidding procreation were an important and effective tool in their efforts to enforce child-support orders, presumably at least some state legislatures would include such a prohibition among the many sanctions available for failing to comply with support obligations. *None* has done so.[17] Nor has a

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[16] The majority below was therefore demonstrably wrong to assert (Pet. App. 33a) that the application of strict scrutiny to the probation condition in this case would *ipso facto* require the application of strict scrutiny to terms of imprisonment.

[17] To the contrary, the only State to address the issue by statute – Illinois – forbids a judge from requiring a defendant to use birth control as a condition of probation. See *State* v. *Ferrell*, 659 N.E.2d 992 (Ill. App.

single state legislature imposed such a condition, or expressly authorized its imposition, as a means to ensure defendants' compliance with numerous other financial obligations, such as restitution orders. Furthermore, the fact that such a condition expires at the end of the probationary period naturally leads to the question why, if the condition is necessary to accomplish an important state interest, it does not continue in force after probation concludes. And, if the condition in this case were needed to serve an important state interest, the State presumably would have asked the trial judge to impose it – but the State did not do so; the judge acted *sua sponte*.

Finally, the condition in this case manifestly was not narrowly tailored to avoid gratuitous interference with the right to procreate. The trial judge made perfectly clear how little weight he placed on that fundamental right in petitioner's case: "if you think I'm trampling all over your constitutional rights, so be it." Jan. 13, 1999 Trans. at 30. None of the courts below identified any unique or even distinctive circumstance supporting a prohibition on petitioner's having additional children. In particular, unlike the only case in which another court has sustained such a probation condition – *State* v. *Kline*, *supra*, in which the defendant's parental rights were revoked because of his vicious child abuse – the trial judge in this case did not deem petitioner an unfit parent or otherwise indicate that he should avoid contact with children.

According to the majority below, the condition was appropriate on these facts merely because the trial judge knew (1) "that Oakley had a number of support orders" and "had been employed and had no impediment preventing him from working," as well as (2) that Oakley's prior probation "was in the process of being revoked." Pet. App. 14a. But these facts do not materially narrow the class of persons who would be subject to such an extraordinary limitation on the fundamental right to procreate. Petitioner's twenty-five-thousand-dollar support arrearage is substantial, but it does not distinguish him from

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1995) (citing 730 ILCS 5/5-5-3(k)), *pet. for leave to appeal denied*, 664 N.E.2d 644 (Ill. 1996).

thousands of other individuals. Indeed, the trial judge himself emphasized that "[t]here's [sic] a lot of people in Mr. Oakley's situation" (Jan. 13, 1999 Trans. at 25-26), and the majority below similarly placed great weight on the fact that, "[o]f those single parent households with established child-support awards or orders, approximately one-third did not receive any payment while another one-third received only partial payment." Pet. App. 9a. Accord *id.* 35a (Bradley, J., dissenting) ("The majority's own statistical data regarding non-payment of support belies its contention that this case is truly exceptional."). Similarly, thousands of other individuals no doubt have withheld child support for longer than the 120-day period at issue in this case.[18]

Because the Wisconsin Supreme Court's holding that the probation condition in this case is "narrowly tailored" to further an important state interest conflicts with decisions of this Court and of other courts, certiorari should be granted.

III. This Case Presents An Ideal Opportunity To Decide The Question Presented.

This Court's certiorari determination should be guided by the fact that there will be few, if any, other opportunities to decide the important question presented here because probation conditions forbidding procreation, although frequently imposed,

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[18] See, *e.g.*, *Deadbeat Parents to Lose Licenses*, TIMES-PICAYUNE (NEW ORLEANS), Jan. 13, 2002, at 5 (noting that nearly 45,000 Louisiana parents were at least 90 days late in paying child support); *The "Subsidy Termination for Overdue Payments Act of 2001": Hearings on H.R. 866 Before the Subcomm. on Gov't Efficiency, Financial Management, and Intergovernmental Relations of the House Comm. on Government Reform* (June 6, 2001) (testimony of Wendell Primus, Center on Budget and Policy Priorities) (noting that 83% of noncustodial parents in Baltimore with current child support order were in arrears); Conrad deFiebre, *Officials Bank on Name Release to Find Deadbeats*, STAR TRIB. (Minneapolis), May 26, 2001, at B1 (describing plan to review bank-customer lists in effort to track down assets of 77,000 state residents with child-support obligations who are five months or more in arrears).

are rarely subject to appellate review.[19] A defendant in petitioner's circumstances faces the realistic prospect that, if he

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[19] Thus, the many appellate decisions cited above that address probation conditions prohibiting procreation appear to be only the tip of a rather large iceberg. State trial court rulings are almost never published and, in part for that reason, frequently escape press attention as well. The exceptions tend to be cases in which the defendant's crime is extreme and notorious. See, *e.g.*, *Woman Jailed in Florida For Having 2d Baby*, N.Y. TIMES, Jan. 27, 1984, at A10 (Jackie Fourthman prohibited from bearing children for 15 years after pleading guilty to third-degree murder and aggravated child abuse in connection with the death of her son from malnutrition and dehydration; although the father of Ms. Fourthman's child successfully appealed the condition (see *Burchell* v. *State*, 419 So. 2d 358 (1982) (per curiam)), Ms. Fourthman never appealed and was subsequently jailed when she left the state to give birth to her second child (see *Mother Is Sentenced for Defying Probation*, N.Y. TIMES, Mar. 1, 1985, at A10)); Jef Feeley, *Woman Accepts Sterilization as Term of Plea*, NAT'L L.J., Aug. 18, 1986, at 61 (South Carolina prosecutors allowed Debra Ann Williams, charged with murder in connection with the starvation death of her infant son, to plead guilty to manslaughter in exchange for her agreement to have herself sterilized; Ms. Williams apparently did not appeal); *Woman Is Sterilized in Hope of Leniency in Child's Death*, N.Y. TIMES, Oct. 8, 1988, § 1, at 7 (Melody Baldwin, who pleaded guilty to neglect charges in connection with the death of her four-year-old son, to whom she had given a fatal dose of psychotropic drugs, underwent sterilization in hope that (as trial judge suggested) she would receive a lighter sentence); Felicity Barringer, *Sentence for Killing Newborn: Jail Term, Then Birth Control*, N.Y. TIMES, Nov. 18, 1990, § 1, at 1 (Tracy Wilder sentenced to two years in prison and ten years on probation in connection with the death of her newborn daughter, whom she smothered in the bathroom of a Florida hospital; plea agreement included requirement that she use birth control while on probation); United Press Int'l, *Judge Orders Mother to Be Given Contraceptive*, Sept. 6, 1991, *available in* LEXIS, Arcnws File (Cathy Lanel Knighten pleaded guilty to injuring her daughter to keep her in the hospital; plea agreement, which allowed her to avoid jail time, required Ms. Knighten to have a contraceptive device (effective for five years) implanted in her arm); *State* v. *Ferrell*, 659 N.E.2d 992 (Ill. App. 1995) (Susie Ferrell pleaded guilty to abusing her infant son and was sentenced to three months in jail and four years' probation, including a probation condition that she "not perform any act, or engage in any activity which has the reasonable potential of causing her to become pregnant." Ms. Ferrell appealed only after she became pregnant and her probation was revoked. On appeal, the

prevails on appeal, his term of probation will be replaced with a multi-year prison sentence. The majority below was thus correct to recognize that, as a general matter, "parole conditions infrequently face appellate review" because "criminal defendants, facing the more punitive alternative of incarceration, are generally unwilling to appeal conditions of their probation." Pet. App. 17a n.24. One commentator has similarly explained, "the defendant often is unwilling to risk filing an appeal for fear of going to prison if appellate review overturns the conditions." Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 78 (2000). Further, when probation conditions are imposed as part of a plea agreement, "defendants frequently believe they cannot challenge the probation conditions, no matter how inappropriate or unconstitutionally intrusive." *Id.* Thus, a review of sentences imposed by a Texas state court judge dubbed the "King of Shame" for his practice of imposing probation conditions deliberately designed to humiliate defendants found that *none* of the fifty defendants he had sentenced during a three-year period appealed the conditions to which they were subject. *Id.* at 83 & n.42.

Nor is there any doubt that the question presented here arises with sufficient frequency to merit this Court's attention. Although conditions abrogating a probationer's right to procreate are infrequently appealed, the evidence suggests that they are imposed with alarming regularity:

Appellate Court of Illinois (Fourth District) held that the no-pregnancy condition violated a state statute prohibiting judges from ordering defendants to use birth control.), *pet. for leave to appeal denied*, 664 N.E.2d 644 (Ill. 1996); *The Object: To Make the Punishment Fit the Crime*, TIME, Feb. 1, 1988, at 22 (Michael Youngblood, a convicted drug dealer and FBI informant who fathered three children out of wedlock, released on probation for five years, but ordered to abstain from sex); Bill Hoffmann, *Weird But True*, N.Y. POST, Mar. 31, 2002, at 19 (plea agreement for Luther Crawford, a father of 12 with child-support arrearages of $54,000, included clause that would prohibit him from ever having sex again; Crawford has asked judge to throw out condition, claiming that he thought the clause was "just a joke").

> Although the courts have repeatedly demonstrated their reluctance to uphold these sorts of conditions, the frequency with which they appear in published cases and media reports makes it clear that trial judges nonetheless impose such conditions with some regularity. Because there is no reason to believe that conditions of this nature are appealed in any higher percentage than is any other category of constitutionally invasive conditions, one must assume a very high rate of unreported instances of the imposition of these conditions.

Horwitz, *supra*, at 137.[20]

Fortunately, this case presents a textbook-perfect vehicle to decide the question presented. The relevant facts are uncontested, and the record details the status of petitioner's compliance with his child support orders. The transcripts of the preliminary and sentencing hearings are also part of the record, and they leave no ambiguity as to the trial judge's rationale in imposing the challenged condition. The unusually detailed ruling of the closely divided Wisconsin Supreme Court (Pet. App. 5a-40a) also identifies the precise factual premises and requirements of state law under which the case was decided. In sum, this case arises in a context and in a procedural posture that could hardly be better suited to this Court's resolution of the important constitutional question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[20] The question presented may also escape review because, assuming the defendant is willing to appeal (and can secure representation), the case sometimes may become moot before it can be decided in this Court. See Horwitz, *supra*, at 139-40 (in *Dominguez*, *supra*, defendant's probation was revoked after she became pregnant, with condition overturned by appellate court 14 months later); *id.* at 141 (in *Zaring*, *supra*, defendant completed her sentence before the appellate court overturned no-pregnancy condition).

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April 19, 2002

APPENDIX

SUPREME COURT OF WISCONSIN

State of Wisconsin, Plaintiff-Respondent,

v.

David W. Oakley, Defendant-Appellant-Petitioner.

No. 99-3328-CR (L.C. No. 98 CF 206).

Filed November 23, 2001.

OPINION

¶ 1. PER CURIAM. (on motion for reconsideration). David W. Oakley, defendant-appellant-petitioner, moves this court for reconsideration of its opinion in *State v. Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200. Oakley contends that this court misconstrued significant facts in applying the holding to the facts in this case. Since that is not correct, the motion for reconsideration is denied without costs.

¶ 2. Even though the motion for reconsideration is denied, we find it appropriate now to withdraw the following language from the third sentence in paragraph 3, "—where one of the victims was his own child", and the following language from the third sentence in paragraph 14: "his own child and". Justice William A. Bablitch withdraws the sixth sentence in paragraph 33 from his concurrence: "He has abused at least one of them."

¶ 3. To the extent the majority opinion requires clarification, we emphasize that the holding was based on extraordinary circumstances. The facts presented to this court demonstrate that this case is not about a person's inability to pay child support. Rather, the exceptional circumstances outlined show an intentional unwillingness to pay child support by a man with a prior criminal record. The exceptional circumstances of this case include, among other things, that Oakley was in arrears in support of his nine children in excess of $25,000.00, and that Oakley had three convictions, and four read-ins, for intentional refusal to pay child support, in violation of Wis. Stat. § 948.22. Under such circumstances, the probation condition is not overbroad. Furthermore, the probation condition is reasonably

related to the goal of rehabilitation, and is narrowly tailored to serve the compelling state interest in requiring parents to support their children.

¶ 4. SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE (concurring). Although I was in the dissent in this opinion, I agree that the motion for reconsideration should be denied. But I conclude that the per curiam opinion is not an adequate response to the motion.

¶ 5. David Oakley explicitly states that he does not seek "reconsideration of the novel legal holding adopted by the Court—*viz.*, that a court may in certain extraordinary circumstances condition a defendant's probation on his not having children unless certain prerequisites are met."[1]

¶ 6. Rather, Oakley's motion for reconsideration is based on the application of the holding to what he considers are mistakes made by the majority in the statement of the facts of the case. Oakley asserts that the majority misapprehended the undisputed facts. He urges the majority to hold that the imposition of such an extraordinary condition of probation was not appropriate on the facts of this case.

¶ 7. I conclude that the per curiam opinion should be further developed in light of Oakley's assertions about the majority's misapprehension of the facts.

I

¶ 8. Oakley asserts that the majority misapprehended the following two key facts: (1) the majority misapprehended Oakley's compliance with his child support obligations prior to the imposition of the condition of probation; and (2) the majority

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[1] Oakley notes that the majority opinion is internally inconsistent in stating the prerequisites he must meet to satisfy the conditions of probation. Oakley notes that the majority opinion states that the circuit court's order requires him to "avoid having another child, unless he shows that he can support that child and his current children." Majority op. at ¶1. See also ¶¶6, 20. Oakley notes that the majority opinion also states that he can satisfy the condition "by not intentionally refusing to support his current nine children and any future children." Majority op. at ¶20.

misapprehended Oakley's supposed history of intimidation and abuse.

¶ 9. First, Oakley asserts that the majority misapprehended Oakley's compliance with his child support obligations prior to the imposition of the condition of probation. Oakley states that the majority did not consider that he had in fact made child support payments and that his payments constituted in excess of 70% of his child support obligations. Exhibits in the record support Oakley's assertions. Oakley argues that the record therefore does not support the majority's premise that the extraordinary probation condition in this case was warranted because of his persistent and stubborn refusal to pay child support. According to the record, any persistent and stubborn refusal to pay child support is limited to the single 120-day period, that is, January 1, 1998, to April 30, 1998, for which he was charged and convicted.

¶ 10. The State does not challenge Oakley's statement of the facts about his support payments. To the contrary, the State responds that it has never contended that Oakley never paid any support for his children.

¶ 11. The majority remains silent about Oakley's support payments during the entire period except from January 1, 1998, to April 30, 1998, in determining the extraordinary circumstances justifying this extraordinary condition of probation. I conclude that the majority has not fully stated the facts in its opinion and in the per curiam opinion and has not considered all the facts in applying its holding.

¶ 12. Second, Oakley asserts that the majority misapprehended his supposed history of intimidation and abuse.

¶ 13. The majority and concurrence apparently agree with Oakley on this point and have appropriately corrected in the per curiam opinion the "facts" stated in the respective opinions.

II

¶ 14. Oakley also asserts that the majority misapprehended Oakley's compliance with his child support obligations subsequent to the imposition of the condition of probation.

¶ 15. The State responds that the circuit court, not this court, is the appropriate forum in which Oakley should make any argument relating to compliance with the condition of probation. I agree with the State.

¶ 16. For the reasons set forth, I write separately. I would deny the motion for reconsideration, but I conclude that the per curiam opinion fails to state or consider significant facts. The per curiam opinion should apply the majority's holding, considering Oakley's record of making support payments as well as his record of not making support payments.

¶ 17. I am authorized to state that Justices ANN WALSH BRADLEY and DIANE S. SYKES join this opinion.

SUPREME COURT OF WISCONSIN

State of Wisconsin, Plaintiff-Respondent,

v.

David W. Oakley, Defendant-Appellant-Petitioner.

No.99-3328-CR

May 1, 2001, Submitted on Briefs

July 10, 2001, Opinion Filed

COUNSEL: For the defendant-appellant-petitioner there were briefs by Timothy T. Kay and Kay & Kay Law Firm, Brookfield, and oral argument by Timothy T. Kay. For the plaintiff-respondent the cause was argued by Thomas J. Balistreri, assistant attorney general, with whom on the brief was James E. Doyle, attorney general.

JUDGES: JON P. WILCOX, J. WILLIAM A. BABLITCH, J., concurs (opinion filed). JON P. WILCOX and PATRICK CROOKS, J.J., join concurrence. PATRICK CROOKS, J., concurs (opinion filed). WILLIAM A. BABLITCH and JON P. WILCOX, J.J., join concurrence. ANN WALSH BRADLEY, J., dissents (opinion filed). SHIRLEY S. ABRAHAMSON, C.J., and DIANE S. SYKES, J., join dissent. DIANE S. SYKES, J., dissents (opinion filed). SHIRLEY S. ABRAHAMSON, C.J., and ANN WALSH BRADLEY, J., join dissent.

OPINION

JON P. WILCOX, J.

¶ 1. This case presents two issues.[1] First, we must decide whether as a condition of probation, a father of nine children, who has intentionally refused to pay child support, can be required to avoid having another child, unless he shows that he

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[1] Oakley initially argued a third issue on appeal to this court: whether the trial court erred in finding that transferring him to an out-of-state prison did not present a new factor to merit resentencing. However, in his reply brief, Oakley acknowledges that he has since been returned to prison in Wisconsin. Accordingly, that issue is now moot. *See State ex rel. Hawkins v. DHSS*, 92 Wis. 2d 420, 421, 284 N.W.2d 680 (1979) (determining that appeal was moot where convicted individual had been released from incarceration).

can support that child and his current children. We conclude that in light of Oakley's ongoing victimization of his nine children and extraordinarily troubling record manifesting his disregard for the law, this anomalous condition – imposed on a convicted felon facing the far more restrictive and punitive sanction of prison – is not overly broad and is reasonably related to Oakley's rehabilitation. Simply put, because Oakley was convicted of intentionally refusing to pay child support – a felony in Wisconsin – and could have been imprisoned for six years, which would have eliminated his right to procreate altogether during those six years, this probation condition, which infringes on his right to procreate during his term of probation, is not invalid under these facts. Accordingly, we hold that the circuit court did not erroneously exercise its discretion.

¶ 2. Second, we must decide whether an individual waives his or her claim of error that the State was impermissibly allowed to withdraw from an earlier plea agreement by entering into a subsequent plea agreement. When a defendant pleads no contest, he or she waives all defenses based on a denial of due process because the prosecutor breached an earlier plea agreement. Thus, we find that there was waiver here.

I

¶ 3. David Oakley (Oakley), the petitioner, was initially charged with intentionally refusing to pay child support for his nine children he has fathered with four different women. The State subsequently charged Oakley with seven counts of intentionally refusing to provide child support as a repeat offender. His repeat offender status stemmed from intimidating two witnesses in a child abuse case. *State v. Oakley*, 226 Wis. 2d 437, 441, 594 N.W.2d 827 (Ct. App. 1999), *rev'd on other grounds*, *State v. Oakley*, 2000 WI 37, 234 Wis. 2d 528, 609 N.W.2d 786. Oakley and the State entered into a plea agreement on the seven counts, but the State, after learning that Oakley's probation in Sheboygan County was in the process of being revoked, moved at sentencing to withdraw the plea agreement. The circuit court for Manitowoc County, Fred H. Hazlewood, Judge, granted the State's motion.

¶ 4. Oakley then entered into another plea agreement in which he agreed to enter a no contest plea to three counts of intentionally refusing to support his children and have the other four counts read-in for sentencing. He further agreed that he would not complain on appeal about the State's withdrawal from the first plea agreement. The State, in turn, agreed that in exchange for his no contest plea, it would cap its sentencing recommendation to a total of six years on all counts. Oakley, however, was free to argue for a different sentence.

¶ 5. At sentencing, Judge Hazlewood informed Oakley that by pleading no contest, he waived his right to have the State prove that he was legally obligated to support his children and that he intentionally refused to do so for at least 120 days contrary to Wis. Stat. § 948.22(2) (1997-98).[2] The State noted that during the relevant time period, Oakley had paid no child support and that there were arrears in excess of $25,000. Highlighting Oakley's consistent and willful disregard for the law and his obligations to his children, the State argued that Oakley should be sentenced to six years in prison consecutive to his three-year sentence in Sheboygan County.[3] Oakley, in turn, asked for the opportunity to maintain full-time employment, provide for his children, and make serious payment towards his arrears.

¶ 6. After taking into account Oakley's ability to work and his consistent disregard of the law and his obligations to his children, Judge Hazlewood observed that "if Mr. Oakley had paid something, had made an earnest effort to pay anything within his remote ability to pay, we wouldn't be sitting here," nor would the State argue for six years in prison. But Judge Hazlewood also recognized that "if Mr. Oakley goes to prison, he's not going to be in a position to pay any meaningful support for these children." Therefore, even though Judge Hazlewood acknowledged that Oakley's "defaults, are obvious, consistent,

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[2] All subsequent references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise indicated.

[3] Oakley's probation on his felony witness intimidation conviction in Sheboygan County was revoked for violating a condition of his probation.

and inexcusable," he decided against sentencing Oakley to six years in prison consecutive to his three-year sentence in Sheboygan County, as the State had advocated. Instead, Judge Hazlewood sentenced Oakley to three years in prison on the first count, imposed and stayed an eight-year term on the two other counts, and imposed a five-year term of probation consecutive to his incarceration. Judge Hazlewood then imposed the condition at issue here: while on probation, Oakley cannot have any more children unless he demonstrates that he had the ability to support them and that he is supporting the children he already had. After sentencing, Oakley filed for postconviction relief contesting this condition and the State's withdrawal from the first plea agreement.

¶ 7. In a per curiam opinion, the court of appeals affirmed the circuit court's rulings on both issues. *State v. Oakley*, 2000 WI App 233, 239 Wis. 2d 235, 619 N.W.2d 308 (Wis. Ct. App. 2000). The court of appeals found that the condition placed on Oakley was not overly broad and that it was reasonable. The court also found that Oakley's decision to enter into the subsequent plea agreement "waived his right to challenge matters relating to the first plea agreement." *Id.* at ¶ 5. Oakley petitioned this court for review, which we granted.

II

¶ 8. Oakley challenges the constitutionality of a condition of his probation for refusing to pay child support. The constitutionality of a condition of probation raises a question of law, which this court reviews independently without deference to the decisions of the circuit court or the court of appeals. *See State v. Griffin*, 131 Wis. 2d 41, 49, 388 N.W.2d 535 (1986); *Edwards v. State*, 74 Wis. 2d 79, 85, 246 N.W.2d 109 (1976).

¶ 9. Refusal to pay child support by so-called "deadbeat parents" has fostered a crisis with devastating implications for our children.[4] Of those single parent households with established child support awards or orders, approximately one-

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[4] In order to address the epidemic of noncustodial parents refusing to pay child support, Congress passed the Deadbeat Parents Punishment Act of 1998, Pub. L. 105-187, amending 18 U.S.C. § 228.

third did not receive any payment while another one-third received only partial payment.[5] For example, in 1997, out of $26,400,000,000 awarded by a court order to custodial mothers, only $15,800,000,000 was actually paid, amounting to a deficit of $10,600,000,000.[6] These figures represent only a portion of the child support obligations that could be collected if every custodial parent had a support order established.[7] Single mothers disproportionately bear the burden of nonpayment as the custodial parent.[8] On top of the stress of being a single parent, the nonpayment of child support frequently presses single mothers below the poverty line.[9] In fact, 32.1% of custodial mothers were below the poverty line in 1997, in comparison to only 10.7% of custodial fathers.[10] Indeed, the payment of child support is widely regarded as an indispensable step in assisting single mothers to scale out of poverty, especially when their welfare benefits have been terminated due to new time limits.[11]

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[5] Timothy Grail, Child Support for Custodial Mothers and Fathers, Current Population Reports, United States Census Bureau, 4 (October 2000).

[6] United States Census Bureau, U.S. Dep't of Commerce, Current Population Survey, Child Support 1997, Table 1 (1998).

[7] Karen Rothschild Cavanaugh & Daniel Pollack, *Child Support Obligations of Incarcerated Parents*, 7 Cornell J.L. & Pub. Pol'y 531 (1998).

[8] *See* Child Support 1997, Table 1; Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 Yale L.J. 1123, 1125-26 (1999) (observing that historically, courts, spurred by increasing concern over the dependency of single mothers, created child support obligations); Daniel R. Meyer, *"Fathers and the Child Support System"* 88, in Child Support: The Next Frontier, (J. Thomas Oldham & Marygold S. Melli eds., 2000).

[9] Marsha Garrison, *"The Goals and Limits of Child Support Policy"* 16 in Child Support: The Next Frontier, (J. Thomas Oldham & Marygold S. Melli eds., 2000).

[10] Grail, *supra*, 2.

[11] Daniel R. Meyer & Maria Cancian, Child Support and Economic Well-Being Following an Exit from AFDC (1996) (report submitted to the Wisconsin Department of Workforce Development); Elaine Sorensen &

¶ 10. The effects of the nonpayment of child support on our children are particularly troubling. In addition to engendering long-term consequences such as poor health, behavioral problems, delinquency and low educational attainment, *inadequate child support is a direct contributor to childhood poverty.*[12] And childhood poverty is all too pervasive in our society. Over 12 million or about one out of every six children in our country lives in poverty.[13] In Wisconsin, poverty strikes approximately 200,000 of our children with 437,000 at or below 200% of the poverty level in 1999.[14] Although payment of child support alone may not end childhood poverty, it could reduce current levels and raise childhood standards of living.[15] Child support – when paid – on average amounts to over one-quarter of a poor child's family income.[16] There is little doubt that the payment of child support benefits poverty-stricken children the most.[17] Enforcing child support orders thus has surfaced as a major policy directive in our society.

¶ 11. In view of the suffering children must endure when their noncustodial parent intentionally refuses to pay child support, it is not surprising that the legislature has attached severe sanctions to this crime.[18] Wis. Stat. § 948.22(2). This

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Chava Zibman, *To What Extent do Children Benefit from Child Support? New Information from the National Survey of America's Families*, 1997, Focus, Spring 2000, at 36-37.

[12] Garrison, *supra*, 16.

[13] Joseph Dalaker & Bernadette D. Proctor, Poverty in the United States, vi Current Population Reports, United States Census Bureau (2000).

[14] Children's Defense Fund, Child Poverty by State-1997 (2000); U.S. Census Bureau, Low Income Uninsured Children by State: 1997, 1998, and 1999, Current Population Survey (1998-2000).

[15] Garrison, *supra*, 22-26.

[16] Sorensen, *supra*, 36.

[17] Sorensen, *supra*, 37.

[18] Justice Bradley seems to disagree with the public policy that intentionally refusing to pay child support should warrant punishment because this crime "imbues a fundamental liberty interest [the right to procreate] with a sliding scale of wealth." Justice Bradley's dissent at

statute makes it a Class E felony for any person "who intentionally fails for 120 or more consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide . . . ."[19] A Class E felony is punishable with "a fine not to exceed $10,000 or imprisonment not to exceed 2 years, or both." Wis. Stat. § 939.50(3)(e). The legislature has amended this statute so that intentionally refusing to pay child support is now punishable by up to five years in prison. See Wis. Stat. § 939.50(3)(e)(1999-2000).

¶ 12. But Wisconsin law is not so rigid as to mandate the severe sanction of incarceration as the only means of addressing a violation of § 948.22(2). In sentencing, a Wisconsin judge can take into account a broad array of factors, including the gravity of the offense and need for protection of the public and potential victims. *State v. Guzman*, 166 Wis. 2d 577, 592, 480 N.W.2d 446 (1992).

> Other factors – concerning the convicted individual – that a judge can consider include:
>
> the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of defendant's

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¶58, joined by Chief Justice Abrahamson and Justice Sykes. However, in opting to score rhetorical points rather than providing a clear and judicious explication of the law, Justice Bradley ignores the central element in this crime: it punishes only intentional refusal to pay child support. If an individual is unable to pay child support, but did not intentionally refuse to do so, this element of the offense would not be met. This is not a strict liability offense. While Justice Bradley may believe that it is unfair for the law to require that "deadbeat parents" not intentionally refuse to pay child support, that is a policy decision for the legislature, not this court.

[19] In Wisconsin, a circuit court typically orders support payments as a percentage of a parent's income, not as an invariable dollar amount. Wis. Admin. Code §§ DWD 40.03 & 40.04 (2001). This means that it is within any parent's ability--regardless of his or her actual income or number of children he or she has--to comply with a child support order.

> culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for close rehabilitative control; the rights of public; and the length of pretrial detention.

Id. After considering all these factors, a judge may decide to forgo the severe punitive sanction of incarceration and address the violation with the less restrictive alternative of probation coupled with specific conditions. Wisconsin Stat. § 973.09(1)(a) provides:

> If a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the department for a stated period, stating in the order the reasons therefor. The court may impose any conditions which appear to be reasonable and appropriate.

The statute, then, grants a circuit court judge broad discretion in fashioning a convicted individual's conditions of probation. As we have previously observed, "the theory of the probation statute is to rehabilitate the defendant and protect society without placing the defendant in prison. To accomplish this theory, the circuit court is empowered by Wis. Stat. § 973.09(1)(a) to fashion the terms of probation to meet the rehabilitative needs of the defendant." *State v. Gray*, 225 Wis. 2d 39, 68, 590 N.W.2d 918 (1999). While rehabilitation is the goal of probation, judges must also concern themselves with the imperative of protecting society and potential victims. On this score, we have explained:

> The theory of probation contemplates that a person convicted of a crime who is responsive to supervision and guidance may be rehabilitated without placing him in prison. This involves a prediction by the sentencing court society will not be endangered by the convicted person not being incarcerated. This is risk that the legislature has empowered the courts to take in the exercise of their discretion. . . .

> If the convicted criminal is thus to escape the more severe punishment of imprisonment for his wrongdoing, society and the potential victims of his anti-social tendencies must be protected.

State v. Evans, 77 Wis. 2d 225, 231, 252 N.W.2d 664 (1977). Thus, when a judge allows a convicted individual to escape a prison sentence and enjoy the relative freedom of probation, he or she must take reasonable judicial measures to protect society and potential victims from future wrongdoing. To that end – along with the goal of rehabilitation – the legislature has seen fit to grant circuit court judges broad discretion in setting the terms of probation.

¶ 13. Nevertheless, this broad discretion given to trial judges has come under fire by various commentators, especially where trial judges elsewhere in the country have imposed probation conditions that reflect their own idiosyncrasies rather than serve a rehabilitative purpose.[20] We agree that judges should not abuse their discretion by imposing probation conditions on convicted individuals that reflect only their own idiosyncrasies. Instead, they should use their discretion in setting probation conditions to further the objective of rehabilitation and protect society and potential victims from future wrongdoing. And because we recognize that convicted felons may have trouble conforming their future conduct to the law, we uphold the power of a judge to tailor individualized probation conditions per Wis. Stat. § 973.09(1)(a).

¶ 14. In the present case, the record indicates that Judge Hazlewood was familiar with Oakley's abysmal history prior to sentencing. The record reveals that Judge Hazlewood knew that

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[20] *See, e.g.*, Andrew Horwitz, *Coercion, Pop-Psychology and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 Wash. & Lee L. Rev. 75 (2000) (advocating greater appellate court oversight of the trial judge's discretion to experiment with new probation conditions); Jon A. Brilliant, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 Duke L.J. 1357, 1384 (1989) (lauding "innovative judges" for imposing creative sentences but urging appellate review when "their creativity strays too far.").

Oakley had a number of support orders entered for his nine children, but he nevertheless continually refused to support them. He was aware that Oakley's probation for intimidating two witnesses in a child abuse case – where one of the witnesses was the victim – was in the process of being revoked. Judge Hazlewood was also apprised that Oakley had promised in the past to support his children, but those promises had failed to translate into the needed support. Moreover, he knew that Oakley had been employed and had no impediment preventing him from working. As the court of appeals observed in the witness intimidation case against Oakley, "the refusal to pay the fines and the victim intimidation both show Oakley's cavalier attitude toward the justice system. . . . Oakley needs to be rehabilitated from his perception that one may flout valid court orders and the judicial process with impunity and suffer no real consequence." *Oakley*, 226 Wis. 2d at 441. Given his knowledge of Oakley's past conduct, Judge Hazlewood was prepared to fashion a sentence that would address Oakley's ongoing refusal to face his obligations to his nine children as required by law.

¶ 15. In doing so, Judge Hazlewood asserted that some prison time coupled with conditional probation might convince Oakley to stop victimizing his children. With probation, Judge Hazlewood sought to rehabilitate Oakley while protecting society and potential victims – Oakley's own children – from future wrongdoing.[21] The conditions were designed to assist

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[21] Justice Bradley misrepresents the record by stating that Judge Hazlewood "acknowledged that Oakley [would] be unable to meet this condition." Justice Bradley's dissent at ¶43. However, a careful reading of the record uncovers no such acknowledgement by Judge Hazlewood. Instead, the record reveals Judge Hazlewood's recognition that Oakley might not be able to earn large amounts of money in the future, but that he would be expected to provide support based on his ability to earn and pay. But Judge Hazlewood had no doubt that Oakley could avoid committing the crimes for which he was convicted: intentionally refusing to support his children, which is what the probation condition is directed at preventing. As previously noted, Judge Hazlewood commented on the intent element of this crime by stating that "if Mr. Oakley had paid something, had made an earnest effort to pay anything within his remote

Oakley in conforming his conduct to the law. In Wisconsin, as expressed in Wis. Stat. § 948.22(2), we have condemned unequivocally intentional refusal to pay child support and allow for the severe sanction of prison to be imposed on offenders. Here, the judge fashioned a condition that was tailored to that particular crime, but avoided the more severe punitive alternative of the full statutory prison term through the rehabilitative tool of probation. At the same time, Judge Hazlewood sought to protect the victims of Oakley's crimes – Oakley's nine children.

¶ 16. But Oakley argues that the condition imposed by Judge Hazlewood violates his constitutional right to procreate.[22] This court, in accord with the United States Supreme Court, has previously recognized the fundamental liberty interest of a citizen to choose whether or not to procreate. *Eberhardy v. Circuit Court for Wood County*, 102 Wis. 2d 539, 561, 307 N.W.2d 881 (1981); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (recognizing the right to procreate as "one of the basic civil rights of man"). Accordingly, Oakley argues that the condition here warrants strict scrutiny.[23] That is,

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ability to pay, we wouldn't be sitting here." While Justice Bradley seems to be attempting to twist Judge Hazlewood's statement regarding Oakley's situation into something with malevolent overtones, the record does not support her effort.

[22] Justice Bradley begins here defending what she apparently perceives is Oakley's absolute right to procreate children while refusing to support them. Justice Bradley's dissent at ¶40. In the process, she diminishes the basic needs of children--the true victims when a parent intentionally refuses to pay child support--contrary to Wis. Stat. § 948.22(2), which is the crime Oakley was convicted of committing. Unlike Justice Bradley, we do not believe that Oakley has an absolute right to refuse to support his nine current children or any future children.

[23] While the condition here survives strict scrutiny, see majority op. at ¶18, we note that probation conditions--like prison regulations--are not subject to strict scrutiny analysis, contrary to the unwarranted assumptions in the arguments of both Oakley and Justice Bradley. Justice Bradley's dissent at ¶45. If probation conditions were subject to strict scrutiny, it would necessarily follow that the more severe punitive sanction of incarceration, which deprives an individual of the right to be free from

it must be narrowly tailored to serve a compelling state interest. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Although Oakley concedes, as he must, that the State's interest in requiring parents to support their children is compelling, he argues that the means employed here is not narrowly tailored to serve that compelling interest because Oakley's "right to procreate is not restricted but in fact eliminated." According to Oakley, his right to procreate is eliminated because he "probably never will have the ability to support" his children. Therefore, if he exercises his fundamental right to procreate while on

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physical restraint and infringes upon various other fundamental rights, likewise would be subjected to strict scrutiny analysis. *See* Sherry F. Colb, *Freedom from Incarceration: Why is This Right Different from All Other Rights?* 69 N.Y.U. L. Rev. 781 (1994) (advocating strict scrutiny for every time an individual is incarcerated because fundamental rights are implicated including total deprivation of the right to be free from physical restraint during the period of confinement). Thus, Oakley and Justice Bradley's position is either illogical in that it requires strict scrutiny for conditions of probation that infringe upon fundamental rights but not for the more restrictive alternative of incarceration, or it is unworkable in that it demands the State meet the heavy burden of strict scrutiny whenever it is confronted with someone who has violated the law. This would be in addition to the State's burden to demonstrate a defendant's guilt beyond a reasonable doubt. We reject the unsupported position of Oakley and Justice Bradley that strict scrutiny applies in this context.

In contrast, Justice Sykes identifies the correct test. Justice Sykes' dissent at ¶68, joined by Chief Justice Abrahamson and Justice Bradley. However, Justice Sykes missteps by failing to apply that test and, in relying on *Zablocki v. Redhail*, 434 U.S. 374, 376, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978), she utilizes strict scrutiny, like Justice Bradley. Justice Sykes' dissent at ¶¶72-73. Although it may be that the facts of *Zablocki* are interesting because it was a Wisconsin case, its holding is not implicated here for the simple reason that the test in *Zablocki* was "when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests," a.k.a., strict scrutiny. 434 U.S. at 388. Therefore, Justice Sykes' dissent is legally inconsistent in that she identifies the correct test (to avoid the precedential pitfalls that Justice Bradley would make as highlighted above), but she nevertheless applies the incorrect test, strict scrutiny, to Oakley's case.

probation, his probation will be revoked and he will face the stayed term of eight years in prison.

¶ 17. While Oakley's argument might well carry the day if he had not intentionally refused to pay child support, it is well-established that convicted individuals do not enjoy the same degree of liberty as citizens who have not violated the law. *See Evans*, 77 Wis. 2d at 230 (asserting that "liberty enjoyed by a probationer is, under any view, a conditional liberty" and that probationer's "position is not that of a non-convicted citizen"); *Von Arx v. Schwarz*, 185 Wis. 2d 645, 658, 517 N.W.2d 540 (Ct. App. 1994) (observing that felon on probation does not enjoy the same constitutional guarantees as the citizenry). We emphatically reject the novel idea that Oakley, who was convicted of intentionally failing to pay child support, has an absolute right to refuse to support his current nine children and any future children that he procreates, thereby adding more child victims to the list. In an analogous case, Oregon upheld a similar probation condition to protect child victims from their father's abusive behavior in *State v. Kline*, 155 Ore. App. 96, 963 P.2d 697, 699 (Or. Ct. App. 1998).[24] In *Kline*, the defendant physically and emotionally abused his wife and children,

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[24] Justice Bradley attempts to minimize the force of *State v. Kline*, 155 Ore. App. 96, 963 P.2d 697 (Or. Ct. App. 1998) as "a single appellate court case from the state of Oregon." See Justice Bradley's dissent at ¶61 n.3. We agree with Justice Bradley's dissent insofar as it implies that parole conditions infrequently face appellate review. While it may be that criminal defendants, facing the more punitive alternative of incarceration, are generally unwilling to appeal conditions of their probation, this lack of mettle should not be taken as justification for overturning any probation condition that happens to reach an appellate court. *See* Horwitz, *supra*, 81-84 (discussing the reluctance of probationer's, "who feel with good cause," that appealing a condition of probation may result in the imposition of incarceration if the condition is overturned). Furthermore, as we previously observed, the particular condition at issue here is only appropriate in the most egregious circumstances. We decline to overturn a probation condition that is reasonably related to a defendant's rehabilitation because it is only utilized when the defendant's conduct is outrageous and therefore even less likely to reach an appellate court. Thus, while the condition here is extreme and is only acceptable where a defendant's conduct is truly shocking, it is not unprecedented.

especially when high on methamphetamine, which caused him to become angry and hostile. 963 P.2d at 698. Until his parental rights to his son were terminated, he abused him regularly, eventually breaking his arm. *Id.* Subsequently, he and his wife had a baby girl. *Id.* Undeterred, the defendant spiral fractured his two-and-a-half month old baby girl's leg and bruised her head and chest, causing her to scream uncontrollably. *Id.* He admitted that "'I caused the bruises on the baby because I don't know my own strength'" and explained his conduct with the observation that "'babies are so hard to understand. They are so frustrating.'" 963 P.2d at 699. The defendant was convicted of criminal mistreatment and as a condition of his probation he was required to successfully complete drug and anger management program and obtain prior written approval of the court before fathering any future child. 963 P.2d at 699. The defendant contested the condition as violating his fundamental right to procreate and asserted that strict scrutiny applied.

¶ 18. The court rejected the defendant's argument that strict scrutiny applied to the probation condition at issue. Securing the rights of his child victims, the court wrote that "the condition provides potential victims with protection from future injury and interferes with defendant's fundamental rights to a permissible degree." *Id.* The court acknowledged that the trial court – like the circuit court in the present case – "did not impose a total ban on defendant's reproductive rights." *Id.* The Kline court further noted that the trial court "expressed its concern for the safety of any children defendant might conceive in the future in the light of defendant's potential for violence associated with his anger and drug abuse problems." *Id.* Similarly, we believe that in light of Oakley's troubling record of child witness intimidation and intentional refusal to pay child support, denying his nine children assistance for their basic needs, the condition here will provide his child victims and any future child victims with some measure of protection from any of Oakley's future acts that may violate the law.

¶ 19. Furthermore, Oakley fails to note that incarceration, by its very nature, deprives a convicted individual of the fundamental right to be free from physical restraint, which in

turn encompasses and restricts other fundamental rights, such as the right to procreate.[25] *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (acknowledging that liberty defined by the Fourteenth Amendment denotes more than just freedom from bodily restraint); *State ex rel. Anderson-El v. Cooke*, 2000 WI 40, ¶24, 234 Wis. 2d 626, 610 N.W.2d 821 (noting that a prisoner's rights and privileges are diminished compared to other citizens, although a prisoner must still be afforded certain constitutional protections). Therefore, given that a convicted felon does not stand in the same position as someone who has not been convicted of a crime,[26] we have previously stated that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." *Edwards v. State*, 74 Wis. 2d 79, 84-85, 246 N.W.2d 109 (1976).[27] In *State v. Krebs*, 212 Wis. 2d

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[25] If Oakley were incarcerated, he would be unable to exercise his constitutional right to procreate. *See Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) (observing that "the Constitution . . . does not create any protected guarantee to conjugal visitation privileges while incarcerated); *Goodwin v. Turner*, 908 F.2d 1395, 1398 (8th Cir. 1990) (asserting that whether restriction of prisoner's right to procreate is valid is determined by whether it "is reasonably related to achieving its legitimate penological objective"); *Goodwin v. Turner*, 702 F. Supp. 1452, 1454 (W.D. Missouri 1988) (holding that "many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement").

[26] For example, convicted felons can be deprived of their constitutional right to vote even after serving their sentence. *See Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (convicted felons can be deprived of their right to vote after serving their sentences); Wis. Const. art. III, § 2(4)(a).

[27] Justice Bradley disregards this reasonability standard and asserts, without any authority, that the probation condition here requires strict scrutiny. Justice Bradley's dissent at ¶45. Nevertheless, there is abundant case law that a probation condition infringing upon a constitutional right is analyzed under the above well-established reasonability standard. Below is a sampling of the cases employing this well-established reasonability standard in analyzing a probation that infringes upon a convicted individual's fundamental right:

1st Amendment-Freedom of Speech

State v. Miller, 175 Wis. 2d 204, 210, 499 N.W.2d 215 (Ct. App. 1993) (holding that probation condition prohibiting probationer from telephoning any woman not a member of his family without prior permission from his probation officer was a reasonable and not overly broad infringement of probationer's first amendment rights); *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995) (asserting that probation condition requiring defendant convicted of obstructing federal court order to refrain from harassing, intimidating, or picketing in front of any abortion family planning services center permissible restriction of First Amendment right of free speech because restriction reasonably related to goal of prohibiting further illegal conduct); *United States v. Clark*, 918 F.2d 843, 847-48 (9th Cir. 1990) (ruling that probation condition that police officers convicted of perjury issue public apology is reasonable because recognition of guilt related to rehabilitation) *rev'd on other grounds sub nom. United States v. Keys*, 95 F.3d 874 (9th Cir. 1996); *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988) (upholding probation condition that defendant not speak for money about her crime, even though it infringed on her right to free speech, because it was reasonably related to her rehabilitation); *United States v. Beros*, 833 F.2d 455, 467 (3d Cir. 1987) (upholding probation condition that defendant refrain from representing union as elected official or paid employee because significant imposition upon defendant's First Amendment rights "reasonable in light of the offense").

1st Amendment-Freedom of Association

Turner, 44 F.3d at 903 (ruling that probation condition prohibiting defendant from harassing, intimidating or picketing in front of any abortion family planning services center permissible restriction of First Amendment freedom of association when convicted of obstructing federal court order and restriction reasonably related to goal of prohibiting further illegal conduct); *United States v. Hughes*, 964 F.2d 536, 542-43 (6th Cir. 1992) (upholding as reasonable a probation condition that prohibited the defendant from representing or serving as officer in Communications Workers of America constitutionally permissible when defendant convicted of violations of IRS Code and federal false statements statutes); *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991) (upholding probation condition that prevented defendant from participating in any motorcycle club activities as reasonably related to the defendant's rehabilitation where he was convicted of being a felon in possession of a weapon); *Malone v. United States*, 502 F.2d 554, 556-57 (9th Cir. 1974) (allowing probation condition that prohibited defendant from associating with Irish cultural, political, or social organizations as reasonably related

to the goals of probation--thereby constitutionally permissible--when defendant, Irish Republican Army sympathizer, convicted of gun running).

1st Amendment-Freedom of Religion and 2nd Amendment-Right to Bear Arms

United States v. Juvenile No. 1, 38 F.3d 470, 473 (9th Cir. 1994) (holding that probation condition prohibiting Native-American juveniles who pleaded guilty to simple assault from possessing firearms until age 21 is constitutionally permissible even though hunting with firearm important religious ritual to juveniles because probation condition reasonably served statutory goals of punishment, deterrence and public protection).

2nd Amendment-Right to Bear Arms

Rice v. United States, 850 F. Supp. 306 (E.D. Pa. 1994) (ruling that Congress could restrict a person's right to possess a firearm, after a conviction for possession of firearms by a convicted felon, even when a pardon was granted with regard to the underlying felony and citing *Lewis v. United States*, 445 U.S. 55, 63 L. Ed. 2d 198, 100 S. Ct. 915 (1980)), *rev'd on other grounds Rice v. United States*, 68 F.3d 702 (3d 1995).

4th Amendment-Right to be Free from Unreasonable Searches and Seizures

Griffin v. Wisconsin, 483 U.S. 868, 874, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987) (upholding Wisconsin law allowing a search of a probationer's home as long as the probation officer has "reasonable grounds" to believe the presence of contraband and reiterating its *Morrissey v. Brewer*, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972) language that "probationers . . . do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special restrictions.'").

Right to Engage in Political Activity or Run for Political Office

U.S. v. Peete, 919 F.2d 1168, 1181 (6th Cir. 1990) (holding that probation condition on elected official convicted of attempting to extort bribe lawfully prevented that official from seeking or serving in elected public office during period of probation were valid because it would assist in the probationer's rehabilitation and protect the public); *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979) (ruling that probationer convicted of violating federal election laws could be lawfully prohibited from running for political office or engaging in political activities during period of probation because the condition was reasonably related to the probationer's rehabilitation).

Freedom of Movement

127, 130-31, 568 N.W.2d 26 (Ct. App. 1997), the court of appeals recently applied this established standard to uphold a condition of probation that required a defendant who sexually assaulted his own daughter to obtain his probation agent's approval before entering into an intimate or sexual relationship. The court found that although the condition infringed upon a constitutional right, it was reasonable and not overly broad. *Id.* at 131.

¶ 20. Applying the relevant standard here, we find that the condition is not overly broad because it does not eliminate Oakley's ability to exercise his constitutional right to procreate.

United States v. Lowe, 654 F.2d 562, 568 (9th Cir. 1981) (upholding probation condition that prohibited defendants convicted of entering a submarine base illegally from coming within 250 feet of the base was reasonable "given the alternatives of imprisonment or some other greater restriction" upon the defendant's rights of movement, association, and speech); *State v. Cooper*, 304 N.C. 180, 282 S.E.2d 436, 439 (N.C. 1981) (ruling that probation condition prohibiting defendant from operating a motor vehicle on the public streets and highways between 12:01 a.m. and 5:30 a.m. was reasonably related to defendant's rehabilitation where defendant pled guilty to fourteen crimes involving the use of stolen credit cards).

Right to Procreate

State v. Krebs, 212 Wis. 2d 127, 131-32, 568 N.W.2d 26 (Ct. App. 1997) (upholding probation condition that required defendant convicted of sexually assaulting his daughter to obtain permission from his probation agent prior to engaging in sexual relationship was reasonable and not overly broad); *State v. Kline*, 155 Ore. App. 96, 963 P.2d 697, 699 (Or. Ct. App. 1998) (rejecting strict scrutiny of probation condition that required defendant to complete drug counseling and anger management treatment before fathering any future children).

Accordingly, in light of the weight of authority indicating that strict scrutiny does not apply when a probation condition infringes upon a fundamental right and the dearth of authority to the contrary, we are convinced that the reasonability standard is the constitutionally valid approach to evaluate a probation condition that infringes upon a fundamental right. To hold otherwise here would elevate the right to procreate--which is undeniably fundamental--above all other fundamental rights, such as free speech, free exercise of religion, and the right to vote. There is no constitutional basis for doing so.

He can satisfy the condition of probation by making efforts to support his children as required by law. Judge Hazlewood placed no limit on the number of children Oakley could have. Instead, the requirement is that Oakley acknowledge the requirements of the law and support his present and any future children.[28] If Oakley decides to continue his present course of conduct – intentionally refusing to pay child support – he will face eight years in prison regardless of how many children he has. Furthermore, this condition will expire at the end of his term of probation. He may then decide to have more children, but of course, if he continues to intentionally refuse to support his children, the State could charge him again under § 948.22(2). Rather, because Oakley can satisfy this condition by not intentionally refusing to support his current nine children and any future children as required by the law, we find that the condition is narrowly tailored to serve the State's compelling interest of having parents support their children.[29] It is also narrowly tailored to serve the State's compelling interest in rehabilitating Oakley through probation rather than prison. The alternative to probation with conditions – incarceration for eight years – would have further victimized his children.[30] And it is

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[28] Contrary to the contention in ¶48 of Justice Bradley's dissent, we have stated condition at issue accurately. *See* ¶6 herein. That Oakley intentionally refused to pay child support is the choice that he made that led to the probation condition. Contrary to Justice Bradley's implication, that is the only choice at issue. It is not the amount of money he makes, but his persistent refusal to pay a cent to his children, despite his ability to do so.

[29] Justice Bradley correctly notes that there is not a single court that "has allowed the right to have children conditioned upon financial status." Justice Bradley's dissent at ¶61. Today's opinion is in accord with that lack of precedent. We uphold Judge Hazlewood's efforts to preserve Oakley's fundamental rights--including his right to procreate--by not incarcerating him. Oakley must only stop committing the crime of intentionally refusing to pay child support in order stay within the conditions of his parole.

[30] The fact that Oakley pled no contest to three counts of Wis. Stat. § 948.22(2) belies the implication in his brief that the State could have utilized other means to serve its compelling interest, such as wage assignment, lien on personal property, or civil contempt. Moreover,

undoubtedly much broader than this conditional impingement on his procreative freedom for it would deprive him of his fundamental right to be free from physical restraint. Simply stated, Judge Hazlewood preserved much of Oakley's liberty by imposing probation with conditions rather than the more punitive option of imprisonment. *See State v. Evans*, 77 Wis. 2d 225, 230, 252 N.W.2d 664 (1977) ("Whether sentence 'is withheld or imposed and stayed, a convicted person's status as a probationer is a matter of grace or privilege and not a right' made possible by the legislature.") (citation omitted).

¶ 21. Moreover, the condition is reasonably related to the goal of rehabilitation. A condition is reasonably related to the goal of rehabilitation if it assists the convicted individual in conforming his or her conduct to the law. *See State v. Miller*, 175 Wis. 2d 204, 210, 499 N.W.2d 215 (Ct. App. 1993) (ruling that condition on probationer convicted of making obscene telephone calls forbidding him to make calls to any woman other than a family member was reasonably related to his rehabilitation); *Edwards*, 74 Wis. 2d at 85 (holding that condition on probationer convicted of three crimes with co-defendants banning her from having any contact with her co-defendants was reasonably related to her rehabilitation). Here, Oakley was convicted of intentionally refusing to support his children. The condition at bar will prevent him from adding victims if he continues to intentionally refuse to support his children. As the State argues, the condition essentially bans Oakley from violating the law again. Future violations of the law would be detrimental to Oakley's rehabilitation, which

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Oakley apparently admits that these means would be ineffective by asserting that he "cannot and probably will never have the ability to properly support [his] children." With this statement, Oakley attempts to confuse the financial ability to support his children fully with the intention of making any effort to do so. That is, Oakley violated § 948.22(2) because he intentionally refused to pay any child support, not because he lacked the financial wherewithal to pay any child support. As Judge Hazlewood observed, "if Mr. Oakley had paid something, had made an earnest effort to pay anything within his remote ability to pay, we wouldn't be sitting here."

necessitates preventing him from continuing to disregard its dictates. Accordingly, this condition is reasonably related to his rehabilitation because it will assist Oakley in conforming his conduct to the law.

III

¶ 22. Having determined that the probation condition is valid, we turn now to the issue of whether Oakley waived his claim of error that the State was impermissibly allowed to withdraw from an earlier plea agreement by entering into a subsequent plea agreement with the State.[31] Whether a defendant has waived his or her claim of error by entering a plea is a question of law which this court reviews de novo. *State v. Lechner*, 217 Wis. 2d 392, 404 n.8, 576 N.W.2d 912 (1998); *State v. Riekkoff*, 112 Wis. 2d 119, 122-25, 332 N.W.2d 744 (1983).

¶ 23. As this court has previously stated, "it is well-established that a plea of no contest, knowingly and understandingly made, constitutes a waiver of non-jurisdictional defects and defenses, including claimed violations of constitutional rights." *Lechner*, 217 Wis. 2d at 404 n.8. Therefore, when a defendant pleads no contest, he or she waives all defenses based on a denial of due process because the prosecutor breached an earlier plea agreement. In the instant case, Oakley pled no contest based on his second plea agreement. By doing so, he waived any claim of error that may have occurred when the circuit court permitted the State to withdraw from the first plea agreement.[32] As the court of

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[31] Although Oakley attempts to frame the issue as whether the circuit court erroneously granted the State's motion to withdraw from the original plea agreement, we need not reach that issue because we determine that Oakley waived his right to a claim of error by entering into the subsequent plea agreement. *See Hawkins v. State*, 26 Wis. 2d 443, 449, 132 N.W.2d 545 (1965) (asserting that there was no need to determine the constitutionality of an allegedly illegal search because the defendant waived his right to litigate that issue with his plea of guilty).

[32] In the second plea agreement, Oakley specifically agreed that he would not appeal the State's withdrawal of the first plea agreement. As the court of appeals observed in *State v. Paske*, 121 Wis. 2d 471, 474, 360

appeals noted in *State v. Paske*, 121 Wis. 2d 471, 474, 360 N.W.2d 695 (Ct. App. 1984), "it is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired." There is no indication here that Oakley's plea was nonconsensual. Accordingly, we find that Oakley, by pleading no contest to the second plea agreement, waived his claim of error that the State was impermissibly allowed to withdraw from the earlier plea agreement.

IV

¶ 24. In conclusion, based on the atypical facts presented by this case, the Constitution does not shield Oakley – whose record evidences consistent disregard for the law and ongoing victimization of his own nine children – from this unique probation condition where he has intentionally refused to support his children. Under the exceptional factors presented by this case, the probation condition is not overbroad and it is reasonably related to the probationary goal of rehabilitation. Indeed, this condition is narrowly tailored to serve the compelling state interest of requiring parents to support their children as well as rehabilitating those convicted of crimes. Moreover, this condition will assist Oakley in conforming his conduct to the law and is therefore reasonably related to his rehabilitation. Finally, we find that he waived any claim of error by pleading no contest under the second plea agreement.

By the Court. – The decision of the court of appeals is affirmed.

¶ 25. WILLIAM A. BABLITCH, J. (concurring). This is a very difficult case, one in which courts are understandably reluctant to get involved.

N.W.2d 695 (Ct. App. 1984), "courts have frequently looked to contract law analogies in determining the rights of defendants allegedly aggrieved in the plea negotiation process." The State bargained for the term that Oakley would not appeal the State's withdrawal of the first plea agreement and Oakley was aware of what he was giving up in agreeing to it.

¶ 26. It is important to note at the outset what this case is all about: It is about a father of nine children who intentionally refuses to support them and was convicted of such.

¶ 27. The two dissents frame the issue in such a way that Oakley's intentional refusal to pay support evolves into an inability to pay support. This case is not at all about an inability to pay support; it is about the intentional refusal to pay support. The difference between an intentional refusal to pay support and an inability to pay support is highly significant and, for me, decisive.

¶ 28. If this case was about the right of the state to limit a person's right to procreate based on his ability to pay support, the position articulated by Justice Bradley, I would in all likelihood join her dissent.

¶ 29. If this case was about the right of the state to prohibit a person's right to procreate based on his likely unwillingness or inability to support a child financially in the future, Justice Sykes' position, I would in all likelihood join her dissent.

¶ 30. This case is about a man who intentionally refuses to pay support regardless of his ability to do so. That was the dilemma faced by the sentencing court, and that is what led to the court's order.[33]

¶ 31. The dissents conclude that the majority's means of advancing the state's interest is not narrowly tailored to advance the state's interest. The dissents fail to advance any realistic alternative solution to what they concede is a compelling state interest. As long as the defendant continues to intentionally refuse to pay support, the alternatives posed by the dissents will end up with incarceration--which of course accomplishes indirectly what the dissents say the state cannot do directly.

¶ 32. Accordingly, I am unpersuaded by the dissents.

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[33] Obviously, Justice Bradley and I differ as to the effect of the circuit court's order. Read in the context of the entire record, I conclude that if Oakley were to show the court a good faith effort to support his children, the order would be amended. *See* majority op. at ¶15 and notes 20 and 21. As the record now stands, Oakley was convicted of an intentional refusal to support his children in any manner.

¶ 33. I conclude that the harm to others who cannot protect themselves is so overwhelmingly apparent and egregious here that there is no room for question. Here is a man who has shown himself time and again to be totally and completely irresponsible. He lives only for himself and the moment, with no regard to the consequences of his actions and taking no responsibility for them. He intentionally refuses to pay support and has been convicted of that felony. The harm that he has done to his nine living children by failing to support them is patent and egregious. He has abused at least one of them. Under certain conditions, it is overwhelmingly obvious that any child he fathers in the future is doomed to a future of neglect, abuse, or worse. That as yet unborn child is a victim from the day it is born.

¶ 34. I am not happy with this result, but can discern no other. And the dissents provide none. Accordingly, I join the majority opinion.

¶ 35. I am authorized to state that Justice JON P. WILCOX and Justice N. PATRICK CROOKS join this concurrence.

¶ 36. N. PATRICK CROOKS, J. (concurring). I join both the majority opinion and the concurrence by Justice Bablitch. I write separately, however, to prevent any misunderstanding regarding the appropriate test for the constitutionality of restrictions on the rights of a probationer. The appropriate test is not the strict scrutiny test, as the majority correctly notes. Majority op. at ¶16 n.23. The proper test is "'conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation.'" Majority op. at ¶19.

¶ 37. I also wish to stress the fact that Oakley's nine children, rather than Oakley himself, are the real victims in this case. Given his history of refusing to pay child support, such failure may very well mean that Oakley's nine children will be raised in poverty. *See* majority op. at ¶¶5, 6, 9, 10. Even though "we have come to recognize that forces not within the control of the poor contribute to their poverty," the law should do what it can to minimize the effects of poverty on children. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970). "From its founding the

Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders." 397 U.S. at 264-65.[34] The usual methods of enforcing child support orders have proved to be totally unsuccessful with Oakley; therefore, extraordinary methods are required.

Of course, I am not suggesting that this is what the sentence should have been. I offer it only as an example of one of many alternatives.

¶ 38. For the reasons stated herein, I respectfully concur.

¶ 39. I am authorized to state that Justice WILLIAM A. BABLITCH and Justice JON P. WILCOX join this opinion.

¶ 40. ANN WALSH BRADLEY, J. (dissenting). I begin by emphasizing the right that is at issue: the right to have children. The majority acknowledges this right, but certainly does not convey its significance and preeminence. The right to have children is a basic human right and an aspect of the fundamental liberty which the Constitution jealously guards for all Americans. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942).

¶ 41. Thus, the stakes are high in this case. The majority's decision allows, for the first time in our state's history, the birth of a child to carry criminal sanctions. Today's decision makes this court the only court in the country to declare constitutional a condition that limits a probationer's right to procreate based on his financial ability to support his children. Ultimately, the majority's decision may affect the rights of every citizen of this state, man or woman, rich or poor.

¶ 42. I wholeheartedly agree with the majority that the governmental interest at stake in this case is of great magnitude. The state has an interest in requiring parents such as Oakley to support their children. As the majority amply demonstrates, the lack of adequate support for children affects not only the lives of

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[34] The dissent's attempt to raise the spectre of a condition of probation potentially "coercive of abortion" intentionally obfuscates the real issue here. *See* dissenting op. of Justice ANN W. BRADLEY, joined by Chief Justice SHIRLEY S. ABRAHAMSON and Justice DIANE S. SYKES at ¶62. What is at issue here is Oakley's wanton refusal to pay support for his nine children.

individual children, but also has created a widespread societal problem. However, when fundamental rights are at issue, the end does not necessarily justify the means. The majority concludes that the means of effecting the state's interest are sufficiently narrow in light of this governmental interest. I disagree.

¶ 43. The circuit court's order forbidding Oakley from having another child until he first establishes his ability to support all his children is unconstitutional. Even the circuit court judge who imposed the condition acknowledged that Oakley will be unable to meet this condition. The probation condition is not narrowly drawn to serve the governmental interest at stake. Additionally, aside from the constitutional infirmities, such a condition of probation entails practical problems and carries unacceptable collateral consequences.

I

¶ 44. The United States Supreme Court has described the right to have children as a "basic liberty" that is "fundamental to the very existence and survival of the [human] race." *Skinner*, 316 U.S. at 541. The right is embodied in the sphere of personal privacy protected from unjustified governmental intrusion by the Due Process Clause of the Fourteenth Amendment. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). This court, in a case involving involuntary sterilization, has emphasized that the right of a citizen to procreate is central to the zone of privacy protected by the Constitution:

> "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Eberhardy v. Circuit Court for Wood County, 102 Wis. 2d 539, 562, 307 N.W.2d 881 (1981) (quoting *Eisenstadt*, 405 U.S. at 453).

¶ 45. Because the right implicated by the condition of probation in this case is one that is central to the concept of fundamental liberty, the state action infringing upon that right is subject to heightened scrutiny. In *Edwards v. State*, 74 Wis. 2d

79, 84-85, 246 N.W.2d 109 (1976), we explained that conditions of probation may impinge upon constitutional rights so long as they are "not overly broad" and are reasonably related to the probationer's rehabilitation. In the non-probation context, any state action infringing upon a fundamental liberty interest can be justified only by a compelling state interest and must be "narrowly drawn" to express only the legitimate state interests at stake. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688-89 (1977). Because of the heightened importance of the liberty interest at stake, whether one chooses to frame the means-end inquiry in a case involving the right to procreate while on probation as "not overly broad" or as "narrowly drawn," I believe the essence of the inquiry is the same.

¶ 46. At oral argument, the State confessed confusion as to which party bears the burden of proving that this state action satisfies the strictures of due process. I do not share this confusion. Ordinarily, where a state action infringes upon a liberty interest that is deemed fundamental under the Fourteenth Amendment, it is "'presumptively unconstitutional.'" *Harris v. McRae*, 448 U.S. 297, 312 (1980). The State must justify its action by establishing that it is narrowly drawn in light of the governmental interest at stake. *See Carey*, 431 U.S. at 684-85; *see also Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972).

¶ 47. It is important to bear in mind exactly what the circuit court order proscribed. The circuit court order forbids Oakley from fathering another child until he can first establish the financial ability to support his children. Oakley is not prohibited from having intercourse, either indiscriminately or irresponsibly. Rather, the condition of probation is not triggered until Oakley's next child is born.

¶ 48. Curiously, the condition the majority is upholding is not the condition that the circuit court imposed. Contrary to the majority's characterization of the condition of probation (compare majority op. ¶6 with ¶20), the circuit court imposed in its January 13, 1999, Judgment of Conviction and Sentence the following condition:

> Defendant is ordered not to have any further children while on probation unless it can be shown to the Court

> that he is meeting the needs of his other children and can meet the needs of this one.

The majority and both concurrences frame the condition as if it only forbids an intentional refusal to pay support. This is not the case.

¶ 49. While on its face the order leaves room for the slight possibility that Oakley may establish the financial means to support his children, the order is essentially a prohibition on the right to have children. Oakley readily admits that unless he wins the lottery, he will likely never be able to establish that ability. The circuit court understood the impossibility of Oakley satisfying this financial requirement when it imposed the condition. The court explained that "it would always be a struggle to support these children and in truth [Oakley] could not reasonably be expected to fully support them." Stressing the realities of Oakley's situation, the circuit court explained:

> You know and I know you're probably never going to make 75 or 100 thousand dollar a year. You're going to struggle to make 25 or 30. And by the time you take care of your taxes and your social security, there isn't a whole lot to go around, and then you've got to ship it out to various children.

¶ 50. In light of the circuit court's recognition of Oakley's inability to meet the condition of probation, the prohibition cannot be considered a narrowly drawn means of advancing the state's interest in ensuring support for Oakley's children.[35]

¶ 51. In a similar context, the United States Supreme Court has explained that a statutory prohibition on the right to marry, a right closely aligned with the right at issue, was not a justifiable means of advancing the state's interest in providing support for children. *Zablocki v. Redhail*, 434 U.S. 374, 388-90 (1978). The *Zablocki* court addressed a Wisconsin statute that prohibited people from marrying until they established that their child support obligations had been met. The Court, in finding the

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[35] In discussing child support percentage guidelines, the majority continues to ignore that it is the circuit court's conclusion that Oakley will be unable to support his children that is determinative.

statute unconstitutional, explained that Wisconsin law provided other available means of advancing the state's interest that did not infringe upon the liberty interest at stake:

> The State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry. Under Wisconsin law, whether the children are from a prior marriage or were born out of wedlock, court-determined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties.

434 U.S. at 389-90 (footnote omitted).

¶ 52. Rather than juxtapose the means chosen in the instant case with the alternatives suggested in *Zablocki*, the majority compares the infringement of Oakley's reproductive liberty with the loss of liberty he would suffer had the circuit court chosen to imprison him. It is true that if Oakley were imprisoned he would suffer an incidental inability to exercise his procreative rights. However, the fact of the matter is that Oakley has not been imprisoned. He is a probationer and has retained a degree of his liberty, including "a significant degree of privacy under the Fourth, Fifth and Fourteenth Amendments." *People v. Pointer*, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357, 363 (Cal. Ct. App. 1984).[36] While the State has chosen not to exercise control over Oakley's body by depriving him of the freedom from restraint, it does not necessarily follow that the State may opt to exercise unlimited control over his right to procreate.

¶ 53. The narrowly drawn means described by the Supreme Court in *Zablocki* still exist today and are appropriate means of advancing the state's interest in a manner that does not impair the fundamental right to procreate. *See, e.g.*, Wis. Stat. § 767.265 (garnishment/wage assignment); § 767.30 (lien on personal property); § 785.03 (civil contempt). These means, as

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[36] *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) (stating that a probationer cannot be denied due process on the premise that probation is an "act of grace").

well as other conditions of probation or criminal penalties, are available in the present case.[37]

¶ 54. In light of these alternative means of advancing the compelling state interest at issue, the State has failed to justify that the elimination, or at best qualification, of the right to procreate is narrowly drawn, or in the words of *Edwards*, that it is "not overly broad." The State, and the majority, can do little more than "infer" that these "less drastic methods" will be ineffective in the case of David Oakley. Brief of Plaintiff-Respondent at 13; *see also* majority op. at n.27. Such an inference does not a constitutional justification make. In the absence of such a justification, the state action limiting Oakley's right to procreate is unconstitutional.

II

¶ 55. In addition to the obvious constitutional infirmities of the majority's decision, upholding a term of probation that prohibits a probationer from fathering a child without first establishing the financial wherewithal to support his children carries unacceptable collateral consequences and practical problems.

¶ 56. First, prohibiting a person from having children as a condition of probation has been described as "coercive of abortion." In *People v. Pointer*, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357, the court concluded that a condition of probation prohibiting a female probationer from becoming pregnant was

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[37] I do not set forth a list of other available conditions of probation or penalties, because they are too numerous to list. However, as the majority acknowledges, at sentencing Oakley requested an opportunity to maintain full employment, provide for his children, and make serious payments towards his child support arrearages. Given Oakley's ability to work, an alternative approach could have been as follows: sentence Oakley to eight years in prison; stay the sentence and place him on probation; a condition of probation is that he serve a substantial amount of time in jail with work release privileges; after getting work release hours extended, another condition of probation is that he maintain two full-time jobs, working a minimum of 70 hours per week; conditions of probation also include parenting classes and alcohol and drug assessment/counseling if deemed appropriate.

unconstitutional. It advanced that such a condition fosters state-coerced abortion:

> In the event she became pregnant during the period of probation the surreptitious procuring of an abortion might be the only practical way to avoid going to prison. A condition of probation that might place a defendant in this position, and if so, be coercive of abortion, is in our view improper.

199 Cal. Rptr. at 366; *see also State v. Mosburg*, 13 Kan. App. 2d 257, 768 P.2d 313, 315 (Kan. Ct. App. 1989).

¶ 57. If the tables are turned to the present case where the probationer is a man, a similar risk arises. Because the condition is triggered only upon the birth of a child, the risk of imprisonment creates a strong incentive for a man in Oakley's position to demand from the woman the termination of her pregnancy. It places the woman in an untenable position: have an abortion or be responsible for Oakley going to prison for eight years. Creating an incentive to procure an abortion in order to comply with conditions of probation is a result that I am not prepared to foster.

¶ 58. Second, by allowing the right to procreate to be subjected to financial qualifications, the majority imbues a fundamental liberty interest with a sliding scale of wealth. Men and women in America are free to have children, as many as they desire. They may do so without the means to support the children and may later suffer legal consequences as a result of the inability to provide support. However, the right to have a child has never been rationed on the basis of wealth.

¶ 59. Nevertheless, the majority has essentially authorized a judicially-imposed "credit check" on the right to bear and beget children. Thus begins our descent down the proverbial slippery slope. While the majority describes this case as "anomalous" and comprised of "atypical facts," the cases in which such a principle might be applied are not uncommon. The majority's own statistical data regarding non-payment of support belies its contention that this case is truly exceptional.

¶ 60. Third, the condition of probation is unworkable. David Oakley is not restrained, and realistically cannot be

stopped, from having intercourse – protected or otherwise. The condition of probation will not be violated until the woman with whom he has sexual relations carries her pregnancy to term. Then, Oakley will be imprisoned, and another child will go unsupported. The Eight Circuit Court of Appeals noted this very problem with such a condition of probation, and concluded that it is unworkable:

> Short of having a probation officer follow [the probationer] twenty-four hours a day, there is no way to prevent [the probationer] from fathering more children. If [the probationer] were to violate this condition of his probation, he may well be returned to prison, leaving him no way to provide for his dependents. This certainly would not serve the district court's goal of "adequately supporting and sustaining" [the probationer's] children.

United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992).

III

¶ 61. In light of the constitutional problems and other dilemmas posed by a condition that limits a probationer's right to father a child without first establishing the financial ability to support his children, it is not surprising that the majority is the sole court in this country to conclude that the condition is constitutional. The majority fails to cite any case law in which a court has allowed the right to have children to be conditioned upon financial status.[38] It does not because it cannot. There is no precedent to cite.

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[38] The majority proffers a single appellate court case from the state of Oregon as analogous authority. It compares this case to *State v. Kline*, 155 Ore. App. 96, 963 P.2d 697 (Or. Ct. App. 1998), in which the Oregon Court of Appeals allowed a probationer's right to father children to be conditioned upon his completion of drug counseling and anger management classes. However, the case at hand would be entirely different had the circuit court merely required Oakley to take a course in financial responsibility or effective parenting, rather than conditioning the right to procreate on an unobtainable requirement of financial wherewithal.

¶ 62. Ultimately, the positions of the majority opinion and concurrences actually undermine the values they seek to promote:

I, too, am concerned about children raised in poverty, as set forth in Justice Crooks' concurrence, but that cannot excuse a condition of probation that has the potential to be "coercive of abortion."[39]

I, too, am troubled by the societal problem caused by "deadbeat" parents as set forth in Justice Bablitch's concurrence, but that problem must be addressed in a workable manner that passes constitutional muster.

I, too, am mindful of the premise that no right is absolute as set forth in the majority opinion, but that premise does not justify making the basic human right to have children subject to financial qualification.

¶ 63. Let there be no question that I agree with the majority that David Oakley's conduct cannot be condoned. It is irresponsible and criminal. However, we must keep in mind what is really at stake in this case. The fundamental right to have children, shared by us all, is damaged by today's decision. Because I will not join in the majority's disregard of that right, I dissent.

¶ 64. I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON and Justice DIANE S. SYKES join this dissent.

¶ 65. DIANE S. SYKES, J. (dissenting). Can the State criminalize the birth of a child to a convicted felon who is likely to be unwilling or unable to adequately support the child financially? That is essentially the crux of the circuit court order in this case, or at least its apparent practical effect.

¶ 66. As a condition of probation for felony nonsupport, the circuit court in this case barred David Oakley from having any more children unless he demonstrates to the court that he is supporting the nine children (by four different women) that he already has, and that he has the financial ability to support

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[39] *People v. Pointer*, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984).

another. That is, Oakley must seek the court's permission and obtain the court's approval before bringing another child into the world. He is subject to probation revocation and imprisonment if he fathers a child without prior court approval.

¶ 67. While I sympathize with the circuit court's understandable exasperation with this chronic "deadbeat dad," I cannot agree that this probation condition survives constitutional scrutiny. It is basically a compulsory, state-sponsored, court-enforced financial test for future parenthood.

¶ 68. I agree with the majority opinion that because Oakley is a convicted felon, infringements on his constitutional rights are evaluated differently than infringements on the rights of those who have not been convicted of crimes. The majority opinion has identified the applicable test: "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to [the probationer's] rehabilitation." Majority op. at ¶19 (quoting *Edwards v. State*, 74 Wis. 2d 79, 84-85, 246 N.W.2d 109 (1976)).

¶ 69. Oakley has fathered nine children by four different women and has consistently failed to support them. He is more than $25,000 in arrears on his support orders, and his pattern of nonsupport is intentional. He is criminally irresponsible, and his children suffer for it. The State's interest in collecting child support for his children is substantial, as is the State's interest in preventing further arrearages.

¶ 70. Under these circumstances, the "no more children" probation condition certainly appears to be reasonably related to Oakley's rehabilitation. No one seems to believe that Oakley will ever be able to bring his arrearages up to date, much less keep current. Adding another child would only make matters worse.

¶ 71. Even under these extreme circumstances, however, and even in light of the State's strong interest in protecting against further victimization of these children, a court-ordered prohibition of procreation without State permission is overly broad.

¶ 72. In *Zablocki v. Redhail*, 434 U.S. 374, 376 (1978), the United States Supreme Court struck down a Wisconsin statute that prohibited the issuance of a marriage license without court approval to anyone with a court-ordered child support obligation. Under the statute, court approval to marry could not be granted unless the marriage applicant proved compliance with the support obligation, and further, that the children covered by the support order were not, and were not likely to become, public charges. *Id.* at 375. The Supreme Court found the statute to be an unconstitutional infringement on the right to marry, because less restrictive means could achieve the state's objective of protecting the interests of children entitled to financial support from non-custodial parents. *Id.* at 390. The Court applied an equal protection analysis, invalidating the statute because it was not "closely tailored" to effectuate the State's interests. *Id.* at 388.

¶ 73. While I recognize that the constitutional tests are somewhat different, *Zablocki* is otherwise closely analogous to this case. Here, as in *Zablocki*, there are less restrictive means available to achieve the State's objectives short of encumbering what everyone agrees is a fundamental human right. As noted by Justice Bradley in her dissent, the circuit court can order Oakley to maintain full-time employment – or even two jobs – as a condition of probation, and to execute a wage assignment to pay off his child support arrearages and satisfy his ongoing support obligations. Wis. Stat. § 767.265. His tax refunds can be intercepted annually. Wis. Stat. § 49.855(4). Liens can be placed on his personal property, and he can be found in civil contempt. Wis. Stat. §§ 767.30, 785.03. He can be criminally prosecuted for any additional intentional failures to support his children, present or future. His probation can be revoked if he fails to maintain employment and make support payments. Granted, Oakley's arrearages are so great, and his history so troublesome, that these means may not ultimately be completely successful in achieving the State's objective of collecting child support. But the same was true in *Zablocki*, and the Supreme

Court nevertheless found the statute in that case unconstitutional. I reach the same conclusion here.[40]

¶ 74. This condition of probation subjects Oakley to imprisonment if he fathers another child without advance permission from the State. Illegitimacy and child poverty, abuse, and neglect are among our society's most serious and intractable problems. Conditioning the right to procreate upon proof of financial or other fitness may appear on the surface to be an appropriate solution in extreme cases such as this, but it is unprecedented in this country, and for good reason. The State can order non-custodial parents to financially support their children, and can criminally prosecute those who intentionally do not. The State can remove a child from a parent's custody when the child is in need of protection from parental abuse, neglect, or abandonment, and can criminally prosecute parents who mistreat their children. But I know of no authority for the proposition that the State can order that a child not be conceived or born, even to an abysmally irresponsible parent, unless the State first grants its consent.

¶ 75. Although Oakley is a convicted felon and therefore may constitutionally be subjected to limitations on the fundamental human liberties the rest of us freely enjoy, he cannot constitutionally be banned from having further children without court permission. In light of available alternatives to achieve the State's significant and laudable objective of collecting past and future child support for these children, who are entitled to and need it, this condition of probation is an overly broad encumbrance on Oakley's right to procreate, and therefore cannot stand. Accordingly, I respectfully dissent.

¶ 76. I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON and Justice ANN WALSH BRADLEY join this dissenting opinion.

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[40] I am not, by this conclusion, applying a "strict scrutiny" equal protection test, as suggested by the majority opinion. Majority op. at ¶16 n.23. As I have noted, I am applying the test from *Edwards v. State*, 74 Wis. 2d 79, 84-85, 246 N.W.2d 109 (1976).

COURT OF APPEALS OF WISCONSIN,
DISTRICT TWO

State of Wisconsin, Plaintiff-Respondent,
v.
David W. Oakley, Defendant-Appellant.

No. 99-3328-CR
September 13, 2000, Decided
September 13, 2000, Filed

Pursuant to WIS. STAT. RULE 809.23(3) of Appellate Procedure, an unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority except to support a claim of res judicata, collateral estoppel or law of the case.

Before Nettesheim, Anderson and Snyder, JJ.

OPINION

¶ 1. PER CURIAM. David W. Oakley appeals from judgments convicting him of three counts of failing to support his children, *see* Wis. Stat. § 948.22(2) (1997-98),[1] as a repeat offender, and from a postconviction order denying his challenge to his sentence and a probation condition. On appeal, Oakley challenges proceedings relating to the withdrawal of a previous plea agreement and a condition of probation. He also alleges that a new factor warrants resentencing. We reject these claims and affirm.

¶ 2. Oakley was originally charged with nine counts of failing to support his nine children, who have four different mothers. The information charged seven counts of failing to support seven of these children. Although Oakley entered into a plea agreement relating to these charges, the State moved at sentencing to withdraw the plea agreement. The court granted

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

the motion to withdraw.[2] Thereafter, Oakley entered into a subsequent plea agreement under which he entered no contest pleas to three counts of failing to support his children. The other counts were dismissed but read-in for sentencing. The State agreed to cap its sentence recommendation to a total of six years on all counts; Oakley was free to argue for a different sentence.

¶ 3. The court accepted the plea agreement and sentenced Oakley to three years in prison on the first count, imposed and stayed an eight-year term on the two other counts, and imposed a five-year term of probation consecutive to the prison sentence. As a condition of probation, the court barred Oakley from having any additional children until he could show the court that he had the means to support them and had been consistently supporting the children he already had.

¶ 4. Postconviction, Oakley challenged this condition of probation and alleged a new factor warranting resentencing: a Dane county circuit court judge had held that it was unlawful to transfer inmates to out-of-state prisons, as had happened to Oakley. The court rejected these arguments. Oakley appeals.

¶ 5. Oakley argues that the circuit court erroneously granted the State's plea withdrawal motion and that he did not waive this claim of error when he entered no contest pleas as part of a subsequent plea agreement. We disagree. Oakley's decision to enter into a subsequent plea agreement, which reduced the counts against him from seven to three, waived his right to challenge matters relating to the first plea agreement. A valid no contest plea waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights. *See State v. Lechner*, 217 Wis. 2d 392, 404 n.8, 576 N.W.2d 912 (1998).[3]

¶ 6. Furthermore, as part of the proceedings relating to the subsequent plea agreement, Oakley acknowledged that he was waiving the right to appeal the demise of the first plea agreement. In light of the foregoing, we do not address

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[2] The reasons for this turn of events are not relevant to our disposition on appeal.

[3] Oakley does not contend that the colloquy relating to the subsequent plea agreement was deficient.

Oakley's claims relating to the demise of the first plea agreement.

¶ 7. We turn to Oakley's claim that a new factor required resentencing. Oakley moved the circuit court to modify his sentence because his transfer to an out-of-state facility was contrary to a decision of a Dane county circuit court which held that such transfers were unlawful. Oakley also contended that his transfer defeated the court's intention of having him support his children while he was incarcerated through a work-release privilege.

¶ 8. Oakley's arguments fail for several reasons. First, the decision of the Dane county circuit court was reversed by the Wisconsin Court of Appeals. *See Evers v. Sullivan*, 2000 WI App 144, 237 Wis. 2d 759, 615 N.W.2d 680. In denying Oakley's sentence modification motion, the circuit court correctly recognized that a decision of one circuit court does not have precedential value for other circuit courts of this state.

¶ 9. The circuit court also stated that it was aware at sentencing of the possibility that Oakley would be transferred out of state. The transfer is not a factor of which the circuit court was unaware at the time of sentencing and therefore is not a new factor. *See State v. Kaster*, 148 Wis. 2d 789, 803, 436 N.W.2d 891 (Ct. App. 1989).

¶ 10. The circuit court did not contemplate that Oakley would support his children while he was incarcerated. In its sentencing remarks, the court perceived incarceration as serving other goals, such as deterring other parents from failing to support their children and to punish Oakley for failing to support his children. The court noted that while incarcerated, Oakley would not "be in a position to pay any meaningful support for these children." Oakley did not show a new factor warranting sentence modification.

¶ 11. We turn to Oakley's challenge to the condition of probation that bars him from having additional children until he shows the court that he has the means to support them and has been consistently supporting the children he already had. Oakley argues that this condition of probation is not reasonable

or appropriate and violates his state and federal constitutional rights relating to privacy and procreation.

¶ 12. The circuit court rejected Oakley's postconviction challenge to this condition. The court reiterated that Oakley was unable to support his current children and unlikely to be able to fully support them in the future. The court reasoned that barring Oakley from procreating was rationally linked to the crimes he committed, failure to support his children, and that this served the public's interest in avoiding additional Oakley offspring whom Oakley would not support. As the court succinctly noted, "[Oakley's] crime is entirely related to his fathering of children he is not inclined to support." The court observed that Oakley's rehabilitation would not "be eased by additional family obligations."

¶ 13. A condition of probation may impinge upon a constitutional right as long as the condition is not overly broad and is reasonably related to the defendant's rehabilitation. *See Krebs v. Schwartz*, 212 Wis. 2d 127, 131, 568 N.W.2d 26 (Ct. App. 1997). Probation conditions are within the sentencing court's discretion. *See State v. Nienhardt*, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995).

¶ 14. In *Krebs*, the defendant, who was convicted of sexually assaulting his daughter, was prohibited from entering into a sexual relationship with another adult unless his probation agent approved. *See Krebs*, 212 Wis. 2d at 130-31. The court held that this provision was rationally related to Krebs's rehabilitation, was not overly broad and merely restricted, rather than eliminated, a constitutional right of privacy. *See id.* at 131-32.

¶ 15. Similarly, Oakley's condition of probation does not prohibit him from engaging in sexual activity. It merely prohibits Oakley from having additional children whom he cannot support, a task at which Oakley has wholly failed and for which he has been held criminally liable. The condition is narrowly drawn and is reasonably related to Oakley's rehabilitation and protection of the public.

¶ 16. The condition placed on Oakley falls between those approved in Krebs and *State v. Garner*, 54 Wis. 2d 100, 105-06,

194 N.W.2d 649 (1972), where the court upheld as reasonable a condition of probation requiring payment of child support where the defendant had been convicted of failing to pay child support. These cases support our conclusion that Oakley's condition of probation is reasonable and not overly broad.

By the Court.-Judgments and order affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)5.

Wisconsin Circuit Branch #3 Manitowoc County

State of Wisconsin, Plaintiff

vs.

David W. Oakley, Defendant

09-29-66

x Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER 98 CF 206

The Court found the defendant guilty of the following crime(s):

CT.	CRIMES	WIS STATUE(S) VIOLATED	PLEA	FELONY OR MISDE MEANOR (F OR M)	CLASS (A OR E)	DATE(S) CRIME COMMITTED
2 CTS.	NON-SUPPORT AS REPEATER	948.22(2) & 939.62(1)(b)	NO CONTEST	F	E	01-01-98 & 04-30-98

IT IS ADJUDGED that the defendant is convicted on 01-13-99 as found guilty and:

x on 01-13-99 is sentenced to prison for eight (8) years on each count. concurrent.

x on 01-13-99 is placed on probation for five (5) years, consecutive to the sentence defendant is presently serving, to commence on defendant's discharge date after parole ends.

Jail: To be incarcerated in the county jail/HOC for ninety (90) days, between hours of employment to commence upon defendant's release from prison

Miscellaneous: Additional ninety (90) days jail, between hours or employment, stayed: to be imposed at agents discretion. Comply with support orders consistent with his ability to pay. Maintain fulltime employment. Defendant is ordered not to have any further children while on probation unless it can be

shown to the Court that he is meeting the needs of his other children and can meet the needs of this one.

IT IS ADJUDGED that no days sentence credit are due pursuant to s. 973.155 Wis. Stats. And shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of Manitowoc

NAME OF JUDGE: Fred. H. Hazelwood
DISTRICT ATTORNEY: Michael C. Griesbach, Ass't
DEFENSE ATTORNEY: Hans Ribbens

BY THE COURT: Janet M Bonin, Deputy Clerk
DATE SIGNED: 01-13-99

Wisconsin Circuit Branch #3 Manitowoc County

State of Wisconsin, Plaintiff
vs.
David W. Oakley, Defendant
09-29-66

x Sentence to Wisconsin State Prisons

The Court found the defendant guilty of the following crime(s):

CT.	CRIMES	WIS STATUE(S) VIOLATED	PLEA	FELONY OR MISDE MEANOR (F OR M)	CLASS (A OR E)	DATE(S) CRIME COMMITTED
NON-SUPPORT AS REPEATER		948.22(2) & 939.62(1)(b)	NO CONTEST	F	E	01-01-98 & 04-30-98

IT IS ADJUDGED that the defendant is convicted on 01-13-99 as found guilty and:

x on 1-13-99 is sentenced to prison for three (3) years consecutive to the sentence defendant is presently serving out of Sheboygan County.

IT IS ADJUDGED that 118 days sentence credit are due pursuant to s. 973.155 Wis. Stats. And shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of Waupun.

NAME OF JUDGE: Fred. H. Hazelwood
DISTRICT ATTORNEY: Michael C. Griesbach, Ass't
DEFENSE ATTORNEY: Hans Ribbens

BY THE COURT: Fred Hazelwood, Circuit Court Judge
DATE SIGNED: 01-13-99

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

- -

STATE OF WISCONSIN, Plaintiff

MEMORANDUM DECISION

-vs-

Case No. 98 CF 206

DAVID OAKLEY, Defendant

- - - - - - - - - - - - - - - - - -

Defendant through his attorney, Timothy Kay, has filed a motion seeking post-conviction relief. Specifically, he asks that this court modify his sentence and strike a condition of probation. The court concludes that argument would not be helpful in deciding the issues. Both requests are denied.

THE MOTION TO MODIFY SENTENCE

The offender asks that his sentence be modified based on a new factor. The new factor is Dane County Circuit Judge Moira Krueger's decision that the Department of Corrections lacks authority under state law to place prisoner's outside the boundaries of the state.

Frankly, this court is stunned by the naivete demonstrated by this motion. I know Judge Krueger and serve on a committee with her. Consequently, I have a high regard for her legal ability. However, the decision of one circuit judge is not precedent for another. The reasoning of one judge may be helpful to another and might have an impact on that judge's decision. But to suggest that it constitutes a "new factor" justifying a modification of a sentence is incredible. Even more disturbing is the fact that the movant didn't include a copy of the decision but rather a report of the decision in the Milwaukee Journal of October 20, 1999. I have a high regard for that newspaper too. But, a newspaper report of a judge's decision should not be cited as an authoritative source in a court proceeding.

The practice of sending some prisoners out of state might, in an appropriate case, have constituted a new factor in sentencing decisions reached before the transfers were started. At the time of Mr. Oakley's sentencing that possibility was known to this court as well as all judges in the state. The

possibility that a prisoner might be transferred out of state could not be a new factor. Returning a prisoner to the state if Judge Krueger's decision is affirmed by an appellate court doesn't seem to me to be something that would have an effect on sentencing either. If the department acted illegally, the solution would be to return Mr. Oakley along with the others to this state–not to modify a sentence.

Finally, this court concluded in an unrelated case that where and in what institution a prisoner serves his or her sentence is not subject to the court's control. See attached Exhibits A, B, C.

MOTION TO STRIKE A CONDITION OF PROBATION

At the time of sentencing, a consecutive five-year period of probation was ordered with imposed and stayed sentences of eight years. The offender seeks to have a condition on that probation term that he not procreate unless he can demonstrate an ability to support his children stricken. Frankly, I would agree with much of counsel's argument were it not for the fact that Mr. Oakley was sentenced and placed on probation for felony nonsupport. Interestingly that fact seems to be missing in the arguments expressed to the court in the motion papers.

At the time of sentencing Mr. Oakley was the father, by a number of women, of at least seven children. He had no physical or mental disability that would prevent him from gainful employment. Given his background the court noted that it would always be a struggle to support these children and in truth he could not reasonably be expected to fully support them. The court noted at the time of sentencing that given his income and the fact that he had not made any effort to have his child support adjusted in light of his serial responsibilities, he couldn't pay what had been ordered. But, at least the public has a right to expect an effort. Instead, he paid no support, even when he was employed.

Counsel suggests at paragraph six of the motion that "...prohibiting Defendant from having further children does not serve to protect the interests of the State and community." It cannot be seriously argued that a condition limiting Mr. Oakley's right to procreate to his ability to support is not in the interest of the state or community. The legal responsibility to

support a child and willful avoidance of that responsibility is the reason he's been convicted and sentenced. His crime is entirely related to his fathering of children he is not inclined to support.

Seen in this light the court's condition that he not father any additional children until he can demonstrate an ability to meet his support obligations makes sense. In addition, his rehabilitation is not going to be eased by additional family responsibilities.

In the same paragraph counsel takes the position that it is the woman's responsibility to avoid having a child the offender will not support. "If a woman is not smart enough to avoid having children by Defendant, so be it. That is her right."

The idea that the onus should rest on the shoulders of the mother in addition to being an incredibly sexist position finds no support in the law. It's in the interests of the community that parents, male and female, support their children. If it wasn't, I suspect the legislature would not have made it a crime to willfully fail to support a child. Parents, regardless of their sex, are obliged by law to support their children. When their good faith efforts fall short society should pick up the slack. When a parent willfully avoids this obligation, society or the other parent must pick up the slack and the law provides for the criminal prosecution of the derelict parent.

Of course, an individual has a right to enjoy and participate in parenthood. That this right is of constitutional dimensions is obvious. But, so is the right to walk the streets as a free person. Mr. Oakley is not a free man because he has been sentenced to prison for willfully failing to support a child. This court can think of no more reasonable restriction on his behavior while on probation that he not father children he cannot support.

Dated this 2nd day of December, 1999.

BY THE COURT

_____

FRED H. HAZELWOOD
Circuit Judge

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(2)

No. 01-1573

In The

Supreme Court of the United States

DAVID W. OAKLEY,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Where petitioner was on probation for multiple counts of felony non-support of his children, did the trial court's order establishing that, as a condition of his probation, petitioner not father any additional children unless he demonstrates to the court that he will not intentionally refuse to support his present nine children and will support any future child, comport with petitioner's rights under the Fourteenth Amendment?

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STATEMENT

The petitioner, David Oakley ("petitioner" or "Oakley"), has nine minor children, who are being raised by their mothers. Through various orders relating to seven of his children, Oakley is required to pay child support to the four mothers (6/16/98 Tr. at 8-10). Although there were no support orders for Oakley's two youngest children, he was still legally obligated to provide for their support under Wis. Stat. § 49.90 (1997-98).

In November and December of 1997, just prior to the time period relating to the criminal charges in this case, Oakley was in the Sheboygan County Jail for an unrelated offense, and on work release (6/16/98 Tr. at 18). While Oakley was in jail, the State garnished the wages he received through work release to fulfill his child support obligations. When Oakley was released from custody, he quit this employment (*id.*), and he quit paying child support (*id.* at 3-7, 13-15).

Because they are unsupported by the appellate record, the respondent disputes any assertions or suggestions by Oakley that he was unemployed, impoverished, or unable to obtain employment from January through April of 1998, the time he intentionally failed to support his children.[1] The record does not indicate what, if any, employment Oakley had during this time period. The record does not demonstrate what, if any, efforts Oakley made to secure full-time employment after terminating the position he had in Sheboygan. The record

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[1] The factual record is relatively undeveloped because Oakley pled no contest, and hence, there was no trial and no presentation of evidence in the trial court, aside from the limited evidence presented at the preliminary hearing.

does indicate that Oakley possesses a variety of job skills including roofing, foundry, remodeling, and factory work, and that he is not physically or emotionally disabled, such that he is precluded from doing hard work (1/13/99 Tr. at 22).

The record provides no support for Oakley's contention that he "indisputably has made substantial efforts to comply with his child-support obligations, having paid seventy percent of the amounts he owes." Pet. at 3. No evidence was presented to the court as to how much money Oakley has paid toward support over the years. There has been no factual finding that his compliance constitutes "substantial efforts." Rather, evidence presented at the preliminary hearing showed that Oakley had not provided any support for his nine children for six months, including the charged time period of January through April of 1998 (6/16/98 Tr. at 3-7, 13-15). The record also shows that Oakley was over $25,000 in arrears at that time (1/13/99, Ex. 1).

Pursuant to a plea agreement, Oakley pled no contest to three counts of intentionally failing to support his children (1/13/99 Tr. at 10). The charges were enhanced because Oakley had a prior felony offense[2] (6/16/98 Tr. at 27). Four

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[2] The prior felony offense was the Sheboygan County conviction. Oakley was convicted of witness intimidation in a child abuse case, in which he threatened a witness who was the subject of a no-contact order (Def.-App.-Pet'r's Mot. for Recons., Ex. 4 at 1). Contrary to Oakley's assertion (Pet. at 6 n.4), the underlying charge of child abuse was not meritless. Rather, pursuant to a plea agreement under which Oakley pled guilty to the witness intimidation charge, the child abuse charge was dismissed and read in at sentencing (Def.-App.-Pet'r's Mot. for Recons., Ex. 1 at 5; Ex. 3). When a defendant agrees to a read-in charge as part of a plea to another charge, he admits the conduct underlying the read-in charge, and agrees that the conduct can be considered both in sentencing him on the charge of which he is convicted and in imposing restitution. *Robinson v. City of West Allis*, 619 N.W.2d 692, ¶¶41-42 (Wis. 2000).

additional counts of failure to support four additional children during the same time period were dismissed and read in for the purposes of sentencing (1/13/99 Tr. at 2).

Before accepting Oakley's no-contest plea, the trial court conducted a plea colloquy (1/13/99 Tr. at 3-9). The court established that Oakley understood the elements of the offense, including that he had a legal obligation to support the children and that he intentionally or willfully failed to provide that support (*id.* at 4). By pleading no contest, Oakley admitted that he intentionally failed to support his children. Any present suggestion that he simply could not afford to support his children is inconsistent with his no-contest plea and must be rejected.

On count one, the trial court sentenced Oakley to three years' imprisonment, consecutive to his sentence for the Sheboygan County felony offense (*id.* at 27). On counts two and three, the court sentenced Oakley to eight years' imprisonment, concurrent to count one, but stayed the sentence and ordered five years of probation (*id.* at 28). As conditions of probation, the court ordered that Oakley spend three to six months in the county jail, where he could use the work-release officer to help him find a job (*id.* at 29). The court ordered that Oakley maintain full-time employment and "comply with the support orders as they may be consistent with [his] ability to pay" (*id.* at 29-30). The court also ordered Oakley: "that you not have any further children while you're on probation unless you can demonstrate you have the ability to support them and have been consistent in your support of the children that you already have" (*id.* at 30).

Contrary to petitioner's assertion, the court did not impose the condition "knowing [he] would be unable to satisfy it." Pet. at 4. The Wisconsin Supreme Court opinion

directly contradicts this suggestion, stating that "a careful reading of the record uncovers no such acknowledgement by Judge Hazlewood." Pet. App. at 14a-15a n.21. "Instead, the record reveals Judge Hazlewood's recognition that Oakley might not be able to earn large amounts of money in the future, but that he would be expected to provide support based on his ability to earn and pay." *Id.* Judge Hazlewood repeatedly indicated that if the court-ordered amounts of child support were too high, then Oakley should seek to have the orders adjusted, rather than simply ignoring the orders or choosing not to comply with the orders (1/13/99 Tr. at 23-24, 27, 28, 29).

Judge Hazlewood also made it clear to Oakley that Oakley could return to court to ask it to change the condition of probation forbidding him from fathering another child. The judge stated that if Oakley could demonstrate that he was supporting his present children and had the ability to support another child, the court would modify the condition (*id.* at 30).

Judge Hazlewood discussed the rationale for the sentence, including the prison sentence and the probation conditions. The judge indicated that perhaps the experience of going to prison would serve as a wake-up call, resulting in Oakley assuming his responsibilities with respect to his children (*id.* at 28). Judge Hazlewood stated that he hoped Oakley could acquire additional skills while in prison to improve his job prospects (*id.*). The judge stressed the need for Oakley to assume the responsibility for the support of his children (*id.*).

Oakley did not contest the conditions of his probation at sentencing. Oakley subsequently moved the trial court to modify the condition prohibiting him from fathering another child unless he was in compliance with his child support

orders, arguing that the condition was not reasonable and appropriate and that it violated the Fourteenth Amendment (12/1/99 Mot.). The court denied the motion, noting that Oakley's offenses are entirely related to his fathering of children that he is not inclined to support. Pet. App. 50a-51a. The court said that Oakley's rehabilitation would not be eased by additional family responsibilities. Pet. App. 51a.

Oakley appealed to the Wisconsin Court of Appeals. The court of appeals rejected the challenge and affirmed the judgment of conviction. Pet. App. at 41a-45a. The Wisconsin Supreme Court granted Oakley's petition for review, and also affirmed. Pet. App. at 5a-40a.

The supreme court acknowledged the fundamental liberty interest of a citizen to choose whether or not to procreate. Pet. App. at 15a, ¶16. Nevertheless, the court stated that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." Pet. App. at 18a-19a, ¶19, citing *Edwards v. State,* 246 N.W.2d 109, 111 (Wis. 1976). Applying that standard, the court found that the probation condition was "not overly broad because it does not eliminate Oakley's right to exercise his constitutional right to procreate." Pet. App. at 22a-23a, ¶20.

In reaching that conclusion, the court found that the probation condition did not limit Oakley's right to procreate nearly as much as Oakley suggested. The court construed the probation condition as merely requiring Oakley to "mak[e] efforts to support his children as required by law." *Id.* Hence, "[i]f Oakley decides to continue his present course of conduct -- intentionally refusing to pay child support -- he will face eight years in prison regardless of how many children he has." *Id.* Conversely, "Oakley can satisfy this condition by not intentionally refusing to support his

current nine children and any future children as required by the law." *Id.* In sum, "the condition essentially bans Oakley from violating the law again." *Id.* at 24a-25a, ¶21.

> [Oakley] can satisfy the condition of probation by making efforts to support his children as required by law. Judge Hazlewood placed no limit on the number of children Oakley could have. Instead, the requirement is that Oakley acknowledge the requirements of the law and support his present and any future children. If Oakley decides to continue his present course of conduct -- intentionally refusing to pay child support -- he will face eight years in prison regardless of how many children he has. Furthermore, this condition will expire at the end of his term of probation. He may then decide to have more children, but of course, if he continues to intentionally refuse to support his children, the State could charge him again under [Wis. Stat.] § 948.22(2). Rather, because Oakley can satisfy this condition by not intentionally refusing to support his current nine children and any future children as required by the law, we find that the condition is narrowly tailored to serve the State's compelling interest of having parents support their children. It is also narrowly tailored to serve the State's compelling interest in rehabilitating Oakley through probation rather than prison.

Pet. App. 22a-23a, ¶20 (footnotes omitted).

REASONS FOR DENYING THE PETITION

The issues raised by petitioner do not warrant this Court's review. *First*, the probation condition, as construed by the Wisconsin Supreme Court, is far narrower than petitioner suggests.[3] This undermines his claim of constitutional error and his claim that this case presents an issue of broad importance. *Second*, petitioner has miscast

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[3] The Wisconsin Supreme Court's construction of the probation condition is a state law determination, settled by the State's highest court. Oakley is bound by this construction of the condition. Any implicit or explicit efforts he makes to broaden the construction of the probation condition must be rejected.

the standard of review applied by the Wisconsin Supreme Court and thereby contrived a conflict where none exists. *Third*, there is no conflict between the holding of the Wisconsin Supreme Court and the holding of any federal court of appeals or state's highest court; and there is no direct conflict between the holding below and the holding of any state intermediate appellate court. *Finally*, the Wisconsin Supreme Court correctly decided the issue before it.

I. As Construed By The Wisconsin Supreme Court, All The Probation Order Does Is "Essentially Ban[] Oakley From Violating The Law Again."

The probation condition at issue does not, contrary to the petition, prohibit Oakley from procreating during the full term of his probation, or until he is capable of paying his full child support obligations. *E.g.*, Pet. at 4, 9, 25. Rather, only if Oakley continues to *intentionally* fail to pay his obligations is he barred from procreating. Of course, if Oakley engages in the intentional refusal to pay his child support obligations, he will again be in violation of the Wisconsin Statutes, and he will be separately violating a different condition of probation, requiring that he not commit any crime. Either may lead to his further incarceration. This is why the Wisconsin Supreme Court concluded that the probation order "essentially bans Oakley from violating the law again." Pet. App. at 24a, ¶21.

Accordingly, the constitutional concerns raised by petitioner are not truly present in this case. This is not a case where the State has permanently or significantly limited a probationer's right to procreate. This is not a case where the State has limited the procreation, contraception, or matrimonial rights of a class of people. Rather, this case is

about one very specific probation condition imposed on the petitioner, which only limits his ability to procreate if he continues to choose to violate the law. In the end, the case is much ado about very little.

This case simply does not present "an ideal opportunity" to decide the question presented by the petitioner. If the question is truly an important question worthy of this Court's review, the question will likely arise in a number of cases. This is especially true if, as petitioner asserts (Pet. at 27-30), courts are frequently imposing conditions restricting procreation.

II. The Wisconsin Supreme Court Applied A Heightened Standard Of Review That Does Not Conflict With The Decisions Of Any Federal Court Of Appeals Or State's Highest Court, Or With Any Decisions Of This Court.

A. The Wisconsin Supreme Court applied a heightened standard of review.

It is well-settled law in Wisconsin that probation conditions that infringe on constitutional rights are permissible only if "they are not overly broad and are reasonably related to the person's rehabilitation." *Edwards*, 246 N.W.2d at 111. This standard was acknowledged as the appropriate standard in both the majority and the dissenting opinions in the present case. Pet. App. at 19a, ¶19 (articulating and applying *Edwards* standard); 30a-31a, ¶45 (Bradley, J., dissenting) (indicating that condition is subject to heightened scrutiny under *Edwards*); 38a, ¶68 (Sykes, J., dissenting) (agreeing with majority that the applicable test is set forth in *Edwards*). As Justice Bradley accurately states in her dissenting opinion, "whether one chooses to frame the

means-end inquiry in a case involving the right to procreate while on probation as 'not overly broad' or as 'narrowly drawn,' I believe the essence of the inquiry is the same." Pet. App. at 31a, ¶45.

The mere fact that the majority labeled this standard a "reasonableness" standard (Pet. App. at 19a n.27) does not change the substance of the standard, which is one that requires heightened scrutiny. Further, the *Edwards* test that was applied here is not the same as the statutory requirement that the conditions be "reasonable and appropriate." Wis. Stat. § 973.09(1) (1997-98). The "reasonable and appropriate" statutory standard is applied to all challenges of probation conditions, even those that do not implicate constitutional rights. When the probationer also challenges the condition on constitutional grounds, the heightened standard articulated in *Edwards* is necessary.

Petitioner suggests that the Wisconsin courts would use the same test to review challenges to probation conditions, regardless of whether or not the condition impinges on one's constitutional rights. Pet. at 12. This is not what Wisconsin precedent directs, nor is it suggested by the opinion below. Where, as here, a constitutional right is burdened by a probation condition, then the condition will be sustained only if the condition is not overly broad and is reasonably related to the person's rehabilitation. Pet. App. at 19a, ¶19, citing *Edwards*, 246 N.W.2d at 111.

B. The standard of review applied below does not create a conflict with a federal court of appeals or among the states' highest courts.

Petitioner contends that certiorari should be granted because of a conflict among the state and federal courts. Pet.

at 9-11. Notably, petitioner cites only one federal court of appeals decision and decisions of the intermediate appellate courts of several states to support his contention. Petitioner does not identify a single decision of a state's highest court that is arguably in conflict with the decision below.

The heightened level of scrutiny applied by the court below is consistent with *United States v. Smith*, 972 F.2d 960, 962 (8th Cir. 1992) (stating that conditions that restrict a probationer's freedom must be especially fine-tuned). It is also consistent with decisions of other state courts which applied a heightened standard of review to reach the constitutional question. *See, e.g, People v. Pointer*, 199 Cal. Rptr. 357, 364 (Cal. Ct. App. 1984) (subjecting condition that infringes on constitutional right to "special scrutiny" to determine whether the condition is entirely necessary to serve the dual purposes of rehabilitation and public safety); *State v. Mosburg*, 768 P.2d 313, 314 (Kan. Ct. App. 1989) (indicating that there are limitations on probation conditions that infringe on constitutional rights).

In each of these cases, just as in the present case, the court recognized that a heightened level of scrutiny is necessary when evaluating probation conditions that infringe on constitutional rights. Although the language used by each court varied, there is little substantive difference in the articulated standards. Any differences in the phraseology of the standards for evaluating the validity of probation conditions, as articulated by the state and federal appellate courts, do not justify the grant of certiorari in the present case.

In the present case, the petitioner and respondent agree that a heightened standard of review is required when evaluating a probation condition that impinges on a

constitutional right. The Wisconsin court applied such a heightened standard of review.

C. The decision below in no way conflicts with *United States v. Knights*.

Contrary to petitioner's argument (Pet. at 8, 12-13), Wisconsin's standard of review does not conflict with *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587 (2001). This Court's decision in *Knights* does not articulate the applicable standard to be applied when addressing whether a probation condition that impinges on a constitution right is valid. *See generally, Knights*, 122 S.Ct. 587.

In *Knights*, the Court was not asked to determine the constitutional validity of a probation condition requiring Knights to submit to searches, by any probation officer or law enforcement officer, without a warrant or reasonable cause. *Id.* at 588. That is because Knights did not challenge the validity of the probation condition. Rather, after law enforcement personnel conducted a search of Knights' property and found evidence of criminal activity, Knights sought to suppress evidence of the search, asserting that the search violated the Fourth Amendment. *Id.* at 588-90. Hence, the question before the Court was whether that warrantless search by law enforcement, which was supported only by reasonable suspicion, was reasonable within the meaning of the Fourth Amendment such that the evidence was admissible at Knights' criminal trial. *Id.* at 590.

In deciding that the search complied with the Fourth Amendment, the Court stated: "Inherent in the very nature of probation is that probationers 'do not enjoy the "absolute liberty to which every citizen is entitled."'" *Id.* at 591, quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). "Just

as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.* The Court stated that the probation condition was reasonable under California law.[4] *Id.* at 591-92. Thus, to the extent that the Court discussed the validity of the probation condition, it did so by articulating the California test that is generally used for challenges to probation conditions, rather than a heightened standard of review.

The Court did not purport to set a general standard for evaluating probation conditions, however. Indeed, the Court expressly declined to consider whether the unconstitutional conditions doctrine applied, whether Knights' consent was a complete waiver of his Fourth Amendment rights, and whether police could have conducted a suspicionless search. In the end, all the Court did was hold that the search was supported by reasonable suspicion and was "reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' *Ohio v. Robinette*, 519 U.S. 33, 39, [] (1996), with the probation search condition being a salient circumstance." *Knights*, 122 S.Ct. at 591.

The standard of review applied below simply is not in conflict with this Court's opinion in *Knights* or any relevant decision of this Court.

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[4] The Court's indication that the condition was reasonable was based on the following California standard: "Under California law, a probation condition is invalid if it (1) has no relationship to the crime of which defendant was convicted; (2) relates to conduct which itself is not criminal; and (3) requires or forbids conduct which is not reasonably related to future criminality." *Knights*, 122 S. Ct. at 592 n.5 (citation omitted).

III. The Wisconsin Supreme Court's Decision Upholding The Probation Order Does Not Conflict With The Holding Of Any Federal Court Of Appeals Or A State's Highest Court.

Petitioner cites to one federal court of appeals case and several cases from various intermediate appellate state courts that have ruled that a probation condition was invalid. Pet. at 19-20. Petitioner has not identified a single decision from a federal court of appeals where a probation condition was invalidated on federal constitutional grounds. Likewise, petitioner has not identified a single decision from the highest court of any state that invalidated a probation condition limiting procreation, on any grounds.

In the decisions cited by petitioner, some of the probation conditions were invalidated because they were found to be unconstitutional. *See, e.g., Pointer*, 199 Cal. Rptr. at 365-66 (holding probation condition prohibiting probationer who was convicted of child endangerment from becoming pregnant was overly broad and not intended to serve any rehabilitative purpose); *State v. Livingston*, 372 N.E.2d 1335, 1337-38 (Ohio App. 1976) (holding probation condition prohibiting the bearing of children is an unreasonable and unconstitutional burden to place on an already pregnant woman); *Mosburg*, 768 P.2d at 315 (determining condition prohibiting probationer who was convicted of endangering a child from becoming pregnant unduly intrudes on probationer's right to privacy). Most of the conditions in these cases, however, were invalidated because the conditions were determined to be unreasonable or in violation of applicable statutes. *See, e.g., Smith*, 972 F.2d at 962 (determining that condition barring probationer who was convicted of possession of heroin with intent to distribute from conceiving children other than to his wife, unless he demonstrated that he is fully providing support to his three

present children, did not meet the standards of 18 U.S.C. §§ 3553 and 3563); *Wiggins v. State*, 386 So. 2d 46, 46-48 (Fla. App. 1980) (holding condition prohibiting probationers who were convicted of uttering or burglary from engaging in non-marital sexual intercourse was not reasonably related to their past or future criminality and therefore invalid); *Thomas v. State*, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (holding condition prohibiting probationer who was convicted of grand theft and battery from becoming pregnant was not reasonably related to her past or future criminality and therefore invalid).

Each case involving a challenge to a probation condition requires a fact-specific analysis. Thus, each case is necessarily limited to the facts presented in the case. None of the aforementioned cases established a general rule that restrictions on procreation were never an appropriate condition of probation. Further, none of these cases presented facts comparable to the present case.

Hence, it is not true that the decision below, which found the probation condition to be valid, is in conflict with the cases cited by petitioner. The mere fact that a probation condition was found to be invalid in those cases does not demonstrate that the decisions are in conflict with this case.

IV. This Case Is Not Otherwise Appropriate For Review.

The judgment below is not in conflict with this Court's precedents. This court has never held that probationers have a fundamental right to procreation that cannot be limited, even where the condition advances the purposes of probation, including the need to rehabilitate the probationer and protect the public. Petitioner's reliance on *Skinner v.*

Oklahoma, 316 U.S. 535, 541 (1942), and the contraception cases is misplaced. The decision below does not conflict with any of the cited cases.[5]

In *Skinner*, this Court held that a state statute allowing for the sterilization of certain repeat offenders violated the Equal Protection Clause. 316 U.S. at 541-43. The Court stated that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.* at 541. Because the law unfairly discriminated between offenders whose offenses were "intrinsically the same," *id.* at 539, the Court concluded that the Equal Protection Clause was violated. The Court did not hold that state-sponsored sterilization or more temporary and less severe limits on procreation would never be constitutional.

The contraception line of cases is also not in conflict with the decision below. Each of the contraception cases involves a statute of general applicability affecting citizens at large. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that ban on use of contraceptives by married couples unconstitutionally intrudes on right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that law prohibiting use of contraceptives by unmarried persons violated equal protection because it treated married and unmarried persons differently); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977) (holding that prohibition

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[5] To the extent that petitioner appears to be challenging Wisconsin's probation statute as overly broad (Pet. at 15-17), respondent notes that petitioner did not raise such a claim in the state courts. Hence, any challenge to the Wisconsin probation statute would not properly be before this Court. This case presents neither a statutory challenge nor an Equal Protection challenge.

of distribution of contraceptives to persons over sixteen except through licensed pharmacist unconstitutionally burdened right to privacy, and served no compelling state interest). In each case, the Court concluded that the statute at issue did not survive strict scrutiny review.

The present case is very different than the contraception cases. Most notably, the present case involves a condition of probation. The restriction applies only to one convicted felon, and not to a broad group of law-abiding citizens. As recognized by this Court in *Knights*: "Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." 122 S.Ct. at 591 (internal quotation omitted). "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.*

The present case is not in conflict with *Zablocki v. Redhail*, 434 U.S. 374 (1978). *Zablocki* involved a general state statute affecting any citizen who was behind in child support payments. The statute provided that any resident who was under an order for child support and sought to marry had to demonstrate that the children in the support order were "not then and [were] not likely thereafter to become public charges." *Id.* at 375. This court noted that the statute created a class of people for whom the right to marry was restricted. "Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove their children will not become public charges." *Id.* at 387. This Court found numerous shortcomings in the statute, *id.* at 388-90, and struck down the statute, concluding that it violated the Equal Protection Clause. *Id.* at 382, 391.

Contrary to *Zablocki*, the present case presents a narrow restriction on one convicted felon who has intentionally failed to support his nine children. The present case does not involve an overbroad statute that serves to prevent those who may be willing, but unable, to support their children from marrying or from having children. Petitioner was not convicted because he was financially unable to support his children; he was convicted because he was unwilling to support his children. Notably, most of the "numerous other means" which were articulated in *Zablocki* have been used to try to get Oakley to comply with his child support obligations. Oakley has been subjected to wage assignments and criminal proceedings (6/16/98 Tr. at 20). While in custody, some of the wages he earned through work release were used to pay his support obligations (*id.*). As a condition of probation in the present case, Oakley must maintain full-time employment and pay his child support (1/13/99 Tr. at 29).

No one disputes that it is an appropriate condition of probation that Oakley must pay his child support obligations. If Oakley again intentionally fails to support his children, he will be subject to revocation of his probation and further criminal charges. The result of either of these may be further incarceration, which would restrict his liberty generally, but specifically would restrict his ability to procreate. Nonetheless, petitioner apparently views these as more constitutionally valid means. The soundness of this view is questionable.[6] *See generally*, Sherry F. Colb, *Freedom from*

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[6] Notably, petitioner asserts that many probationers will accept conditions of probation that limit procreation in lieu of receiving prison sentences. Pet. at 28-29. This is likely true because these probationers believe that incarceration is truly a much greater infringement on their liberty than any short-term requirement that they do not procreate.

Incarceration: Why is this Right Different from All Other Rights?, N.Y.U. L. Rev. 781 (1994) (arguing that right to be free from physical confinement is, and ought to enjoy the status of, a fundamental right).

This is not to say that a court can impose a probation condition impinging on procreative rights in any case where the court could have sentenced the criminal defendant to prison. Pet. at 24-25. Rather, where, as here, the condition is not overly broad and is reasonably related to the person's rehabilitation, then a court may appropriately consider that the condition might be a less restrictive alternative to incarceration and impose such a condition.

Petitioner cites cases where courts have taken the children into state custody, apparently suggesting that this may be less offensive to the Constitution. Pet. at 24 n.15. "[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000), citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923). This Court has held that the "liberty" protected by the Due Process Clause includes the right to establish a home and bring up children, or the right to direct the upbringing and education of their children. *Id.* Any contention that the right to procreate is more fundamental than the right to have custody of and raise one's own children cannot be supported by the Constitution or this Court's precedent. In some cases, like the present case, it is much more reasonable and appropriate to condition procreation on the probationer's willingness to adhere to his support obligations than it would be to take the children into state custody.[7]

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[7] This is especially true where there is no evidence that the children's mothers are not adequately caring for the children.

Limiting Oakley's right to father additional children until he establishes that he is following the law by not intentionally failing to support his current nine children is a reasonable, constitutional restriction on this right. The probation order entered below is not overly broad and is reasonably related to Oakley's rehabilitation. The decision below, which upheld the validity of this condition, is not in conflict with this Court's precedent interpreting the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-1573

IN THE

Supreme Court of the United States

DAVID W. OAKLEY,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF *AMICUS CURIAE* CENTER ON FATHERS, FAMILIES, AND PUBLIC POLICY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

With the consent of the parties pursuant to Rule 37 of the Rules of this Court,[1] the Center on Fathers, Families, and Public Policy (CFFPP) submits this brief as amicus curiae in support of the petition for writ of certiorari. Amicus is a nationally focused public policy organization that concentrates on issues facing low-income families. The mission of CFFPP is to help create a society in which low-income parents – mothers as well as fathers – are in a position to support their children emotionally, financially, and physically. Amicus has an interest in this case because it raises a fundamental question as to the procreative rights of the poorest members of society.

SUMMARY OF THE ARGUMENT

This Wisconsin Supreme Court's decision in this case is the first to restrict a parent's fundamental right to procreate based on his or her financial situation. It is, in the words of Wisconsin Supreme Court Justice Bradley, the first case "to declare constitutional a condition that limits a probationer's right to procreate based on his financial ability to support his children." *See State v. Oakley*, 629 N.W.2d 200, 216 (Wis. 2002) (Bradley, dissenting). In the United States, 2.5 million noncustodial parents do not pay child support and are poor themselves. For these parents, this decision will enable government to restrict their fundamental right to have children.

Certiorari should be granted because the decision below is unconstitutional and, for related reasons, unwise. The application of this probationary condition encourages abortions. A woman who through misfortune or even carelessness becomes pregnant by the petitioner will necessarily

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1. Petitioner has filed a general consent for all parties wishing to submit an amicus brief. The consent of the Respondent is being Lodged herewith. Pursuant to Rule 37.6, counsel for amicus curiae certify that no counsel for a party authored this brief in whole or part, and no person or entity other than amicus curiae, or their counsel, has made a monetary contribution to this brief's preparation or submission.

feel a substantial pressure to have an abortion, for the only other alternative sends Mr. Oakley to jail and, thereby, eliminates any chance the child's father would have the income to pay support. The probationary condition in this case is furthermore different in a critical respect from other government influences on poor persons' procreative choices. This is not a case in which the state is distributing resources in a manner that merely influences the decision whether to have a child. Instead, for very low-income noncustodial parents, the Wisconsin Supreme Court has granted judges the power to place an absolute *bar* on the right to have children. Finally, even if such a probationary condition could ever be sustained in extraordinary circumstances, the one in this case fails to provide guidance to Mr. Oakley or future noncustodial parents as to when they may at the court's discretion exercise this fundamental right.

Separately, the principal premises underlying the Wisconsin Supreme Court's decision are simply wrong. The child support system was not designed to eradicate poverty for low-income families. For these families the process of determining the amount of child support a noncustodial parent must pay is fundamentally flawed. Initial child support orders often do not reflect the parents' true ability to pay child support. Once these child support orders are set it is extremely difficult for low-income fathers to get the order modified down to a lower amount based on a change in circumstances. Both low-income custodial and noncustodial parents face many difficulties sustaining employment thus they often need such modifications. This lack of steady employment and insufficient income explains why the payment of child support by low-income noncustodial parents will not significantly reduce poverty. Even if the child support system worked appropriately for every family and the payment of child support could significantly reduce poverty, this probationary condition will negatively impact low-income families. It is indicative of a trend in the government to place limits on the fundamental right of poor persons to procreate.

Accordingly, given the importance of the liberty interest at stake, the petition for writ of certiorari should be granted.

ARGUMENT

This Court should review the extraordinary probation condition in this case, which prevents a father from having a child unless he shows that he can support that child and his current children. *See Oakley*, at 201. A bitterly divided Wisconsin Supreme Court considered this probation condition reasonable given Oakley's "ongoing victimization of his nine children" through the nonpayment of support. *See id.* This victimization, the court's opinion notes, is caused by the increased likelihood that children whose parents do not pay child support will live in poverty. *See id.* at 204.

Indeed, the impact of poverty is at the heart of the trial judge's punitive probation condition. Yet for low-income families, the child support system was not designed or created to eradicate poverty. Because of poverty low-income noncustodial parents often do not have the ability to fully comply with their child support orders. Contrary to the reasoning behind the Wisconsin Supreme Court's opinion, even if parents like Mr. Oakley were able to and did pay their child support, this payment would not significantly reduce poverty. Further this probation condition will only lead to discrimination against the poor. The United States Supreme Court should grant certiorari to review this fundamental violation of Mr. Oakley's right to procreate.

I. EVEN IF THE CHILD SUPPORT SYSTEM WORKED TO HELP LOW-INCOME FAMILIES THIS PROBATIONARY CONDITION WILL LEAD TO DISCRIMINATION AGAINST THE POOR

Even if child support could truly support the most impoverished members of our society, the decision to restrict the fundamental right to procreate will have serious negative consequences. This probationary condition is part of trend to

regulate and control low-income families' procreation rights. Yet this probationary condition is the starkest example of government interfering in so fundamental of a right. This Court should grant certiorari because this probationary condition will fundamentally alter the ability of low-income families to enjoy the same basic human freedoms as wealthy and moderate-income members of our society.

A. NONE OF THE PREVIOUS RESTRICTIONS ON POOR PERSONS' FUNDAMENTAL RIGHT TO PROCREATE HAVE GONE AS FAR AS THIS TRIAL JUDGE'S EXTRAORDINARY PROBATION CONDITION

No infringement on poor persons' fundamental right to procreate has gone as far as the condition imposed in the instant case. This probationary condition varies from other measures affecting reproductive rights in three dramatic ways. First this restriction is tied directly into the child support system instead of the welfare system. Second this restriction will have a devastating impact on low-income families. Finally, this restriction because of its indeterminate nature will lead to discrimination against the poorest members of our society.

First this infringement on the procreation rights of Mr. Oakley is not tied to the denial of government subsidies. The family cap (discussed *infra*) is one example of a law that is intended to impact procreation by the denial of benefits. While many commentators have argued it is unconstitutional, *see, e.g.*, Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. J.1 (Dec. 1995), courts have generally not found the family cap unconstitutional. *See, e.g., N.B. v. Sybinski*, 724 N.E.2d 1103, 1108-1111 (Ind. Ct. App. 2000). The rationale behind these court decisions is that government has no affirmative duty to provide support to its neediest members. Therefore, government can place restrictions on these benefits. *See generally Dandridge v.*

Williams, 397 U.S. 471 (1970) (upholding state imposed restrictions, including the restriction in question of a maximum family grant on AFDC recipients).

The probationary condition placed on Mr. Oakley is different. Family law mandates that any man who is the biological father of a child must pay support for that child, regardless of the nature of the father's relationship with the child and the custodial mother, or his income, or his employment history. Further, when the custodial parent is a Temporary Assistance to Needy Families (TANF) recipient the mother's views on whether he should pay support are no longer determinative as to whether to seek support.

Moreover, the other government influences on the procreative rights of TANF recipients do not directly trample on this right as this probationary condition does on Mr. Oakley's right. The family cap statutes do not prohibit reproduction; they simply refuse to provide benefits for children born after a certain time or condition. The family planning programs and the encouragement of TANF recipients to place their children for adoption do not force TANF recipients not to have children, nor for that matter to place the child for adoption.

This probationary condition is different in that it directly forces Mr. Oakley into one of two options: either support his current and future children or do not have another child. Yet the first option, to support his children the way the judge desires for many individuals such as Mr. Oakley is, perhaps, improbable. OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE ESTABLISHMENT OF CHILD SUPPORT ORDERS FOR LOW INCOME NON-CUSTODIAL PARENTS, 1 (July 2000). Even the judge recognized this in imposing the condition when he stated that "it would always be a struggle to support these children and in truth [he] could not reasonably be expected to fully support them." Jan. 13, 1999 Trans. at 30. The reality for many low-income fathers is that because of the instability and fluctuations of income they never will have the ability to pay the amount as ordered without a

modification. Thus, this probation condition will result in strict-liability as to the right to procreate.

This probationary condition varies from the other government influences in another significant manner, namely the impact on the woman who is the mother of the child fathered by Mr. Oakley after the condition is ordered. If Mr. Oakley impregnates another woman the consequences will be severe. As Wisconsin Justice Bradley mentioned in her dissent, this probation condition amounts to state coerced abortion, as it subjects a woman who becomes pregnant by Mr. Oakley even through inadvertence – through all precautions short of celibacy – to an impossible dilemma: send him to jail by carrying the child to term or bear a child whose father will be jailed and therefore unable to pay any child support. *See Oakley*, at 219 (Bradley, J.,dissenting) (citing *People v. Pointer*, 199 Cal. Rptr. 357 (1984)). Such a scheme creates an intolerable burden on the rights of the mother and a disturbing pressure to abort.

Even if the child is not aborted, there likely will be dire consequences for the family. If the probationer does not have the ability to pay child support, he will likely be incarcerated just as his youngest son or daughter is born. If he is incarcerated there will be no hope for him to actually support this new baby. The state will have taken away a potential breadwinner, punishing the child. In addition, this will likely prevent him from being involved in this child's life. Contrary to many stereotypes, growing evidence indicates that many low-income noncustodial parents are actively involved in their children's lives. *See* EARL S. JOHNSON ET AL., FATHERS' FAIR SHARE HELPING POOR MEN MANAGE CHILD SUPPORT AND FATHERHOOD, 44 (1999). Often, even when not able to pay child support providing emotional support to their children. *See id.* This probationary condition was placed on Mr. Oakley because of his alleged victimization of his present and future children through not paying child support. In the end

this probationary condition may victimize the custodial parents and children far more than anything Mr. Oakley does.

Finally, this probationary condition is different in that the other policies limiting the right to procreate are enshrined in legislative classifications. For instance, family cap policies have specific guidelines for TANF recipients to follow. This gives the TANF recipient the ability to know what procreative conduct government will not financially support. The family cap policies were also developed through the legislative process, which enables various policy perspectives to inform the legislators about whether to enact legislation.

By contrast, this probationary condition is flawed for the lack of definitive guidance in two fronts. First, future noncustodial parents charged with not paying child support will lack guidance as to whether a judge will impose this condition on them. This will allow for the idiosyncratic tendencies of each judge to determine who gets to exercise this fundamental right. *See* Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 77 (Winter 2000). This is problematic because "[t]here is also substantial evidence that the entire social panic about the sexual conduct of poor women and the structure of their households is thoroughly intertwined with racist beliefs about the biological and socio-cultural inferiority of African- Americans." *See* Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER L.121, 137 (2002). This will allow judges to use this probation condition in a discriminatory manner against minorities particularly since the majority of impoverished fathers not paying child support are nonwhite. *See* ELAINE SORENSEN & CHAVA ZIBMAN, URBAN INST., A LOOK AT POOR DADS WHO DON'T PAY CHILD SUPPORT 3-4 (Sept. 2000) [hereinafter POOR DADS].

Once imposed this probationary condition also lacks any definitive guidance for Mr. Oakley to follow. The order states

that Mr. Oakley must support his children plus be able to support additional children before having another. But what level of support is necessary to satisfy this probation condition? Justice Bablitch of the Wisconsin Supreme Court seems to think one level of support is necessary but despite his claims to the contrary that truly is not clear from the record. *See Oakley*, at 214 & n.1 (Bablitch, J., concurring). In fact, he highlights that the steps necessary to satisfy this probationary condition are not even clear to the Wisconsin Justices reviewing this case. *See id.* "Obviously, Justice Bradley and I differ as to the effect of the circuit court's order. Read in the context of the entire record, I conclude that if Oakley were to show the court a good faith effort to support his children, the order would be amended." *Id.* This lack of definitive guidance to satisfy the conditions of the probation order offends the procedural aspects of the Due Process Clause.

The Wisconsin legislature has already placed some limitations on what it feels is necessary for a noncustodial parent to pay to support his children even when he is behind in paying his support. In Wisconsin, the child support guidelines provide that a noncustodial parent with five or more children may only be ordered to pay thirty-four percent of his or her income towards child support. *See* WIS. STAT. ANN. § 49.22 (9) (West 2002); WIS. ADMIN. CODE § 40.03(1) (2002). In addition, the payment of current support plus any additional amount towards arrearages cannot leave the party at an income below the federal poverty line. *See* WIS. STAT. ANN. § 767.265 (1) (West 2002). The decision in this case reflects no such legislative judgment.

What happens if providing thirty-four percent of his income, which is the amount Mr. Oakley would owe under the Wisconsin child support guidelines, places him below the federal poverty level? To illustrate, if Mr. Oakley can earn six dollars per hour and works forty hours per week. He will then have a yearly income of $8,236.8, which studies show is significantly higher than most noncustodial parents have who work and do not pay child support. *See* POOR DADS, *supra*, at 4 (noting that the

average income of noncustodial parents who do not pay child support and do work is $5,570 per year). After his employer garnishes thirty-four percent of his income for current child support he will have $5436.29 per year to live on. Assuming that he lives alone, the federal poverty level for one individual in the forty-eight contiguous states is $8,860. *See* U.S. Dep't of Health and Human Servs. Poverty Guidelines 67 Fed. Reg. 6931-6933 (Feb. 2002).

B. THIS PROBATIONARY CONDITION IS PART OF A GROWING TREND TO RESRICT THE FUNDAMENTAL RIGHTS OF THE POOR

There is a general trend to become increasingly punitive to fathers who do not pay child support. Impoverished men are not subjects of our public compassion. The perceived irresponsibility of fathers takes three forms: they bring into the world "illegitimate" children they do not intend to support, they leave marriages they should remain in, and they fail to pay support. *See* David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575, 2576 (Nov. 1995). This alleged "irresponsibility" is used to justify increasingly punitive measures against noncustodial parents.

One solution to the "problem" of poverty and one way to affect the allegedly "immoral" noncustodial parents is to restrict their fundamental right to procreate. Government can inappropriately justify restrictions on a poor person's right to procreate because they are different from us. Low-income families become less and less deserving of parenthood leading to further restrictions on the right to procreate. *See* Darci Elaine Burrell, *The Norplant Solution: Norplant and The Control of African-American Motherhood*, 5 U.C.L.A. WOMEN'S L. J. 401, 403-05 (Spring 1995). "[C]urrent welfare rhetoric may harbor eugenic themes and may have as its underlying message that poor women (among whom

women of color are disproportionately represented) should not and do not deserve to procreate." Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 368 (1996).

These societal beliefs have increasingly been enshrined in government policy. For instance, twenty-three states have a family cap policy for individuals receiving welfare. *See* Smith, *supra*, at 124. Typically, welfare cash grants have increased modestly with family size. Under the family cap policy, however, if another child is conceived after a family begins to receive welfare, the cash grant does not increase for the family when the child is born. These policies are justified under the mistaken notion that low-income families have more children to get additional welfare benefits. *See* Laura M. Friedman, *Family Cap and The Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J. 637, 657 (1995).

Further, there is an increasing intensification of efforts to promote family planning, contraceptive use, and adoption relinquishment among welfare recipients. *See* Smith, *supra*, at 124. Sixteen states make provisions that all adult TANF recipients must participate in family planning promotion programs. *See id.* at 211. Three states encourage TANF recipients to adopt their children even though there are no allegations of child abuse or neglect. *See id.*

The child support system similarly attempts to regulate poor families' lives. It has long been recognized that there exist dual family law systems. *See* Tonya L. Brito, *The Welfarization of Family Law*, 48 KAN. L.R. 229, 229 (2000) (citing Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614, passim (1965)). Two distinct bodies of family law exist in the United States. *See id.* One system is for the majority of individuals and another system is for poor families and families who receive public assistance. *See id.* The latter system involves

privacy-invading cost-conscious welfare regulations designed to regulate family life. *See id.*

There is no similar invasion of the right to procreate or regulate family life among middle- and upper-income families. "Although welfare reform measures actively discourage women receiving welfare from having additional children (even if the woman has only one child), women in the general population face no such restrictions regardless of the number of children they have." *Id.* at 243. Only when a woman receives public assistance does government try to influence the decision to have a child. *See id.* Given society's trend to limit the procreative rights of its poorest members it is not surprising that the Wisconsin Supreme Court used the prevention of poverty to justify the ability of government to trample on the fundamental right of the poorest members of society to procreate.

II. CONTRARY TO THE WISCONSIN SUPREME COURT'S ASSERTION, CONDITIONING THE RIGHT TO PROCREATE ON THE PAYMENT OF CHILD SUPPORT OBLIGATIONS WILL NOT REDUCE POVERTY IN LOW-INCOME FAMILIES BECAUSE THE CHILD SUPPORT SYSTEM WAS NOT DESIGNED TO ERADICATE POVERTY

Mr. Oakley's situation exemplifies the problem created by the trial judge's punitive probation condition. The logic behind the probation condition was that it would "protect the victims of Oakley's crimes – Oakley's nine children." *See Oakley*, at 207. The Wisconsin Supreme Court emphasized also that the "payment of child support benefits poverty-stricken children the most." *Id.*, at 204. Yet this statement is only true if low-income noncustodial parents have the money to pay their child support orders. The reality is that for low-income noncustodial parents the child support debts they obtain are beyond their ability to pay. Even if they could and did pay child support, low-income families would still be in poverty.

A. FOR VERY LOW-INCOME PARENTS THE TRUE VICTIMS OF THE CHILD SUPPORT SYSTEM ARE THE CHILDREN REGARDLESS OF WHETHER THE NONCUSTODIAL PARENT PAYS CHILD SUPPORT

For welfare recipients the aim of the child support system is primarily cost recovery for the government and not the reduction of poverty. A pregnant woman who meets certain income thresholds can receive Medicaid to cover the cost of her pregnancy. *See* WIS. STAT. ANN. § 49.46(1) (West 2002). The state may then seek reimbursement from the father for the cost of the pregnancy and this cost is added onto his child support bill. *See* WIS. STAT. ANN. § 767.51(3)(e) (West 2002).

In most states, the charging of birth expenses to recoup Medicaid expenses starts a long process of the child support system depriving poor families of their child support. When families apply for TANF, federal law requires the families to assign their right to child support to the State. *See* 42 U.S.C. § 608(a)(3) (2002). The State may then pass through this money to the family or keep it. In fiscal year 2000, the latest year for which there is collected data, the government kept 85% ($1,354,080,032) of child support collected for TANF recipients. *See* 4 OFFICE OF PLANNING, RES. AND EVAL., U.S. DEP'T OF HEALTH AND HUMAN SERVS., ANN. REP. TO CONGRESS (April 2002). Studies have shown that noncustodial parents pay more child support when a state fully passes-through the child support to mothers receiving TANF. *See, e.g.*, DANIEL R. MEYER & MARIA CANCIAN, UNIVERSITY OF WIS.-MADISON, W-2 CHILD SUPPORT DEMONSTRATION EVALUATION, REPORT ON NONEXPERIMENTAL ANALYSES, 1, 5 (Mar. 2002).

The federal government granted Wisconsin, the state in which petitioner lives, a waiver to give all child support to most families on TANF and not factor this support in determinations of eligibility for government assistance programs. *See id.* at 1,

fn. 1. Wisconsin is the only state that has this policy. Yet even in Wisconsin for many low-income families, the "benefits of the pass-through policy are undermined by the amount of debt that men owe [to the government] from previous AFDC arrears." DAVID J. PATE, JR., UNIVERSITY OF WIS. - MADISON, *An Ethnographic Inquiry into the Life Experiences of African American Fathers with Children on W-2*, *in* 2 W-2 CHILD SUPPORT DEMONSTRATION EVALUATION, REPORT ON NONEXPERIMENTAL ANALYSIS, 29, 81 (Mar. 2002).

Because of this cost recovery focus, portions of Mr. Oakley's child support bill are not owed to the mothers of his children but to the government. In Mr. Oakley's situation if you removed all debt that he owed to the state he would have paid over seventy percent of his child support order. *See* Petitioner's Motion for Reconsideration at app. A. Thus, in most cases where the custodial parent is a TANF recipient the cost recovery goal of the child support system makes the children the "victims" whether or not the non-custodial parent pays child support. *See Bowen v. Gilliard*, 483 U.S. 587, 596 (1987) (noting that families will suffer because of the government's decision to not pass-through the child support to AFDC recipients).

B. THE CHILD SUPPORT SYSTEM CREATES UNREALISTICALLY HIGH DEBTS THAT IMPOVERISHED NONCUSTODIAL PARENTS CANNOT PAY AND THAT CREATE SIGNIFICANT NEGATIVE CONSEQUENCES FOR THE ENTIRE FAMILY

The process to determine the amount of child support owed results in orders that low-income noncustodial parents could never pay. First, the child support system charges many fees against noncustodial parents. In addition, the amount of the initial child support order does not correspond with the ability of the parent to pay support. Further the granting of modifications of child support orders for low-income families also fail to reflect noncustodial parents' ability to pay child

support. While the Wisconsin Supreme Court opinion fails to acknowledge this, the resulting child support debts are beyond most low-income noncustodial parents' ability to ever pay.

Throughout the nation and Wisconsin a low-income noncustodial parent faces many charges besides his payment of current child support. Forty-six states charge noncustodial parents for welfare paid before the establishment of paternity. *See* OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., STATE POLICIES USED TO ESTABLISH CHILD SUPPORT ORDERS FOR LOW-INCOME NON-CUSTODIAL PARENTS, 2 (July 2000) [hereinafter STATE POLICIES]. Since May 2000 Wisconsin prohibits the charging of retroactive child support. *See* WIS. STAT. ANN. § 767.51(4) (West 2002) ("liability for past support of the child shall be limited to support for the period after the day on which the petition . . . is filed"). Yet Mr. Oakley faced these potential fees when paternity was established for his children. *See* WIS. STAT. ANN. § 767.51(4) (West 1998) ("The father's liability for past support of the child shall be limited to support for the period after the birth of the child.").

At the establishment of paternity, additional fees may be charged to the noncustodial parent besides retroactive support. Some states, including Wisconsin, charge fathers to reimburse the government for expenses paid by Medicaid associated with the birth of the baby. *See* STATE POLICIES, *supra*, at 2; WIS. STAT. ANN. § 767.51(3)(e) (West 2002) (providing authority to charge these fees). Most states, including Wisconsin, also seek reimbursement from a father for the cost of a genetic test, if the test is part of the paternity hearing. *See* STATE POLICIES, *supra*, at 2; WIS. STAT. ANN. § 767.51(3)(f) (West 2002). The child support system has charged Mr. Oakley over $11,000 in such fees that will never tangibly benefit any of his children. *See* Petitioner's Motion for Reconsideration at App. A.

In addition to these front-end arrears, states charge noncustodial parents other ongoing fees and interest on unpaid support. Forty-six states, including Wisconsin, allow employers to charge fees to noncustodial parents for income withholding. *See* STATE POLICIES, *supra*, at 2; WIS. STAT. ANN. § 767.265(3h)(West 2002). The state child support agency charges noncustodial parents other fees. *See* STATE POLICIES, *supra*, at 2; WIS. STAT. ANN. § 767.29(1)(d) (providing for thirty-five dollar annual fee). In thirty-four states, interest charges on unpaid support can add significant amounts to a noncustodial parent's child support bill. *See* STATE POLICIES, *supra*, at 2. Wisconsin charges twelve percent annual interest on any unpaid child support. *See* WIS. STAT. ANN. § 767.25(6) (West 2002). Until May 2000, Mr. Oakley was charged eighteen percent annual interest on any unpaid child support. *See* WIS. STAT. ANN. § 767.25(6) (1998).

Besides these additional fees, for most low-income noncustodial parents their actual child support order will be beyond their ability to pay:

> [S]tate guidelines that fix awards based on a proportion of income assume a steady income over time, punctuated at most by only brief periods of unemployment. But periodic unemployment may be an unavoidable fact of life for many low-income NCPs [noncustodial parents], especially if they are men of color facing job discrimination in inner cities with weak job markets. For them, imputing steady earnings — even at a low wage — can dramatically overstate their "potential income."

FRED DOOLITTLE & SUZANNE LYNN, MANPOWER DEMON. RESEARCH CORP., WORKING WITH LOW-INCOME CASES: LESSONS FOR THE CHILD SUPPORT ENFORCEMENT SYSTEM FROM PARENTS' FAIR SHARE (May 1998). Forty-eight states, including Wisconsin, nonetheless impute income to noncustodial parents.

See STATE POLICIES *supra*, at 15; WIS. ADMIN. CODE § 40.03(3) (2002).

If the child support order was inappropriately set from the beginning or the noncustodial parent's income fluctuates downward, the child support obligor should be able to modify it downward to reflect his true ability to pay. For low-income obligors a decrease in income is unlikely to cause a change in the order:

> 70 percent of the AFDC cases reviewed, although eligible, were not modified by the CSE [child-support enforcement] agency because of earnings of the obligor, typically a nonresident father, had fallen, warranting a lower payment. The CSE staff typically dropped these cases rather than pursue lowered payments. In contrast, only 15 percent of cases not receiving Aid to Families with Dependent Children (AFDC) were dropped for similar reasons.

MARK TURNER & ELAINE SORENSEN, THE URBAN INST., NONRESIDENT FATHERS AND CHILD SUPPORT MODIFICATIONS, 3 (Oct. 1998) (citing KATHLEEN KOST, ET AL., *Revising Child Support Orders: The Wisconsin Experience*, 45 FAM. RELS. (Jan. 1996)). An increase in a nonresident father's income is more likely to result in an increase in child support than is an equivalent decrease in income likely to result in a lowered payment. *See id.* at 2.

In fact, demographic characteristics of the obligor impact the likelihood of a downward modification more than a change in that parent's economic situation. All else being equal, white noncustodial parents are far more likely than nonwhite noncustodial parents to receive a downward modification of their child support order. *See id.* at 19. In addition, fathers who were never married to the mother of their children are less likely to receive a reduction in child support then fathers who were married to the mother of their children. *See id.* at 16.

These problems with the child support system are compounded because many family law litigants do not have a lawyer to argue for a realistic child support order. In some Wisconsin counties, litigants represent themselves in as many as seventy percent of family law cases. *See* Wisconsin Pro Se Working Group, *Meeting the Challenge of Self-represented Litigants in Wisconsin* 7 (Dec. 2000). This trend is not unique to Wisconsin. "[S]everal states have performed 'legal needs' studies which demonstrated that **large segments of low and middle income families are effectively denied access to the courts** to resolve child custody, **support**, and related domestic problems." Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 123 (Jan. 1993) (emphasis added).

This leads to child support orders that violate federal laws. For non-custodial parents with earnings below the federal poverty level total child support orders were sixty-nine percent of their total earnings in 1996. *See* OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Child Support for Children on TANF*, 13 (Feb. 2002). However, federal law prohibits garnishing over 50 to 65 percent of any individual's paycheck depending on the amount of arrears and whether he supports another family. *See id.* (citing 15 U.S.C.A. § 1673(b)(2) (West 2002)).

In addition to consistently violating federal law, these unrealistically high orders create debts that impoverished noncustodial parents never realistically have the ability to pay. *See* Shannon Bettis Nakabayashi, *A "Dual System" of Family Law Revisited: Current Inequities in California's Child Support Law*, 35 U.S.F.L. REV. 593, 613 (2001). Fathers making as little as minimum wage can end up owing tens of thousand of dollars. *See* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 14 (Spring 1990). Thus, conditioning the right to procreate on the payment of child support is unlikely to make low-income fathers suddenly have money to pay these high debts.

C. CONTRARY TO THE WISCONSIN SUPREME COURT'S OPINION, THE PERCEPTION THAT IF NONCUSTODIAL PARENTS JUST PAID THEIR CHILD SUPPORT POVERTY WOULD BE SIGNIFICANTLY REDUCED DOES NOT MATCH WITH THE ECONOMIC REALITY OF A SIZABLE MAJORITY OF NONCUSTODIAL PARENTS

Most individuals believe that fathers who do not pay child support are "deadbeat" dads. *See Oakley*, at 203. The failure of these deadbeat dads to pay child support is believed to cause poverty among children. The Wisconsin Supreme Court emphasized that "inadequate child support is a direct contributor to childhood poverty." *See Oakley*, at 204. However, that statement is valid only to the extent that the money exists, but remains unpaid.

The Wisconsin Supreme Court's statement fails to recognize the overall economic reality of men faced with poverty themselves. Custodial mothers who are poor and do not receive child support have similar demographic characteristics to poor nonresident fathers who do not pay formal child support. *See* POOR DADS, *supra*, at 4. They both have similar education levels. *See id.* More than forty percent of low-income fathers who do not pay support have not finished high school. *See id.* In fact, only two percent of low-income fathers who do not pay child support have a college degree. *See id.*

Both parents are likely to be unemployed. *See id.* In fact, only thirty-one percent of poor fathers who do not pay child support reported that they were working. *See id.* Of those who do work the average income is only $5,570 per year, comparable to an annual average income of $5,276 for poor custodial parents who do not receive child support. *See id.* at 5.

Social scientists have determined that many low-income individuals truly are not able to sustain employment. The literature identifies many personal barriers for individuals to get employment. These include health limitations, limited education, limited work experience, lack of English skills,

transportation barriers, lack of access to phones, and shelter instability. *See id.* at 5 (citing Zedlewski 1999). Further, the prospect for Mr. Oakley to find a job will diminish greatly because of his incarceration. "Even after they leave prison, work prospects for ex-offenders do not improve that much since their criminal records and interrupted labor force participation make them unattractive to prospective employers." *Id.* at 4.

In addition, there exist many societal barriers to employment. First, low-income fathers have few employment services to help them find a job. *See id.* at 13-14. Second racism is another significant societal barrier to employment prospects of many low-income noncustodial parents. The majority of individuals who are poor and do not pay child support are minorities. *See id.* at 3-4 (noting that the majority of fathers who do not pay child support and are poor are nonwhite). Race and class prejudices are significant barriers to employment. *See* Pate, *supra*, at 78. "But, even when compared to whites with comparable levels of education and residing in comparable regions, African-Americans and other minorities earn lower wages and have lower employment rates." *See* HARRY J. HOLZER, URBAN INST., CAREER ADVANCEMENT PROSPECTS AND STRATEGIES FOR LOW-INCOME MINORITY WORKERS, 1 (Mar. 2000).

Low-income fathers' income is so meager that even if support orders were established and enforced for every child with a living but absent parent, the TANF caseload would only be reduced eleven percent. *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 562 (Fall 1996). Sixty-six percent of custodial mothers with support orders who were not receiving support cited the father's economic inability to pay as the main reason for the nonpayment. *See* Roger Levesque, *Targeting "Deadbeat" Dads: The Problem With the Direction of Welfare Reform*, 15 HAMLINE J. PUB. L. & POL'Y 1, 32 (1994). A 1995 Census Bureau report estimated that if all child support orders had been fully enforced, the proportion of families

living in poverty would have not changed significantly. *See* Chambers, *supra*, at 2594 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991, 9 (1995)).

Thus, the perception that noncustodial parents, such as Mr. Oakley, cause poverty among low-income families and that they are comparatively economically better off does not match with reality. This perception was at the heart of both of the trial judge's order and the Wisconsin Supreme Court upholding that order. *See Oakley*, at 203-05. Instead, most low-income fathers are in similar economic circumstances to the low-income mothers and children whom they are ordered to support. The rhetoric that portrays these fathers as the cause of poverty fails to recognize their economic circumstances. It also fails to recognize the many problems the child support system has in dealing with low-income families. *See* Pate, *supra*, at 80.

* * * *

This Court should grant review of this case because it touches on one of the most fundamental rights of humans. The problems with the child support system create child support debts that many noncustodial parents will never have the ability to pay. The subsequent loss of such a fundamental right for the poorest members of our society grants government too much control over such an intimate decision.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiori, the petition should be granted.

Respectfully submitted,

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In The
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DAVID W. OAKLEY,

Petitioner,

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL ADVOCATES FOR PREGNANT WOMEN; PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; CENTER FOR REPRODUCTIVE LAW & POLICY, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici are leading national women's rights, social justice, and reproductive choice organizations that have a long history of working to protect reproductive freedom for men and women of all economic means, through advocacy, litigation and research. *Amici* are interested in this case because of the threat posed by the state court's decision to the critical privacy protections that this Court has consistently upheld, and because of the particularly harsh impact the decision may have on the procreative rights of low-income individuals and individuals seeking to emerge from the criminal justice system.

STATEMENT OF THE CASE

Amici curiae rely on the Statement of the Case submitted by Petitioner David W. Oakley.

SUMMARY OF ARGUMENT

Amici respectfully urge this Court to grant a *writ of certiorari* because of the important federal question raised by this case, namely the state's ability to impose a condition on probation which explicitly interferes with the right

[1] The Parties have consented to the filing of this brief.

Amici curiae state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party. No person or entity, other than *amici* and their counsel, made a monetary contribution to the submission of this brief.

Individual statements of interest for each *amicus* are set forth in Appendix A.

to procreate, and decided by the state court in conflict with this Court's privacy jurisprudence. The state court decision upholding the provision, which prohibits Petitioner from having any additional children, unless and until he first proves to the court's satisfaction that he will support his previous children and any newborn children, significantly jeopardizes the privacy and procreation rights of individuals, particular those in vulnerable populations, and conflicts with the settled jurisprudence of this Court.

The conflict between the state court's decision and this Court's privacy jurisprudence derives from the state court's failure to appropriately analyze this case as one implicating the fundamental right to privacy, specifically the right to reproductive freedom. Because the challenged probation condition ("no-procreation condition") ties Petitioner's right to have children to his financial status, and because his ability to comply with the condition may rest upon his sexual partner's decision whether to have an abortion should she become pregnant, this case clearly implicates federal constitutional privacy protections. Yet, the Wisconsin court's examination of the condition under rational basis scrutiny, and its approval of the measure as a means for achieving the State's articulated interests, is in direct conflict with this Court's strict scrutiny of other government infringements on the right to procreate. Should it stand, the state court decision will vastly increase state control of private reproductive decisions, with particularly harsh effect on low-income and poor persons, as well as those seeking to emerge from the criminal justice system. Moreover, the decision will open the door to potential state-sponsored population control.

Accordingly, *amici* respectfully urge this Court to grant a *writ of certiorari* to clarify this important federal

question, decided by the state court in conflict with this Court's precedent. *See Skinner v. State of Oklahoma*, 316 U.S. 535, 536 (1942) (granting *certiorari* because interference with the right to have children raises "grave and substantial constitutional questions").

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION CONCERNS THE IMPORTANT FEDERAL QUESTION OF A STATE'S ABILITY TO INTERFERE WITH THE FUNDAMENTAL RIGHT TO PROCREATE

A. This Court Has Long-Recognized That The Right To Privacy, Specifically The Right To Procreate, Warrants Constitutional Protection From Undue Governmental Intrusion

That reproductive decisions are insulated from unnecessary government control is a bedrock principle of this Court's privacy jurisprudence: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (emphasis omitted). Indeed, "[m]arriage and procreation are fundamental to the very existence and survival of the [human] race." *Skinner*, 316 U.S. at 541. These decisions are at the "very heart of [the] cluster of constitutionally protected choices." *Carey v. Population Servs., Int'l*, 431 U.S. 678, 685 (1977). *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992) (noting the Court's long-standing recognition of women's liberty

interest, including the interest in "decisions about whether or not to beget or bear a child").

This Court has accordingly refused to allow unjustified state intrusions into the right to make personal decisions implicating family relations and reproductive choices, repeatedly recognizing that decisions of whether to "accomplish or to prevent conception are among the most private and sensitive." *Carey*, 431 U.S. at 685. *See also Casey*, 505 U.S. at 833 (invalidating conditions which impose an undue burden on the ability to obtain an abortion); *Eisenstadt*, 405 U.S. at 438 (holding unconstitutional a statute prohibiting distribution of contraceptives to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional a statute prohibiting the use of contraceptives by married couples); *Skinner*, 316 U.S. at 535 (holding unconstitutional a statute requiring sterilization of certain convicted criminals). This privacy jurisprudence establishes that decisions implicating the fundamental right to privacy pose important federal questions deserving this Court's consideration.

B. The Challenged Probation Condition Significantly Infringes On The Right To Make Procreative Decisions Free From Government Control

The no-procreation condition, which prohibits Petitioner from fathering a child unless he proves his financial ability to support his children, violates the constellation of fundamental privacy rights described above. As the dissenting Justices of the Wisconsin Supreme Court recognized, the challenged probation condition works an untenable encroachment on these rights by forbidding Petitioner to "father[ ] another child until he can first establish the

financial ability to support his children." *State v. Oakley*, 629 N.W. 2d 200, 217 (Wis. 2001) (Bradley, J., dissenting). *See also id.* at 221 (Sykes, J., dissenting). Thus, Petitioner is subject to imprisonment should he father another child without advance permission from the State. As Justice Bradley noted, "the order is essentially a prohibition on the right to have children," as the court imposing the probation condition recognized that Petitioner would, in all likelihood, never satisfy the financial requirement it was imposing. *Id.* at 217 (Bradley, J., dissenting).

Given Petitioner's financial inability, then, the no-procreation condition hinges Petitioner's continued freedom from incarceration upon (1) the decision of his sexual partner to have an abortion should she become pregnant; or (2) his own actions to wholly eliminate the possibility of procreation, either through sterilization or complete abstinence from sexual intercourse. Either is untenable from a constitutional standpoint. First, because the probation condition is violated only upon the birth of a child fathered by Petitioner which he cannot financially support, should his sexual partner become pregnant, the only way in which Petitioner avoids prison is if his partner has an abortion. The decision of whether his sexual partner terminates a pregnancy, however, is appropriately a decision over which this male Petitioner ultimately has no control. *See Casey*, 505 U.S. at 897-98; *Danforth v. Planned Parenthood of Central Missouri*, 428 U.S. 52, 69-71 (1976). Punishing Petitioner for a decision that is his partner's alone – the decision whether or not to have an abortion – is patently unfair, an injustice magnified by the fact that a pregnancy may result despite Petitioner's best

effort to prevent pregnancy.[2] Moreover, by tying Petitioner's incarceration to his sexual partner's decision whether to carry a pregnancy to term, the no-procreation condition directly burdens his partner's privacy rights, thus fostering state-coerced abortion. *See Oakley*, 629 N.W. 2d at 219 (Bradley, J., dissenting) (citing *People v. Pointer*, 199 Cal. Rptr. 357 (Cal. App. 1984)). *See also State v. Mosburg*, 768 P.2d 313, 315 (Kan. App. 1989) (noting that condition on probation prohibiting pregnancy would force defendant to "choose among concealing her pregnancy . . . , abortion, or incarceration"). *Cf. Little v. Streater*, 452 U.S. 1, 9-10 (1981) (treating state's exertion of financial pressure on female plaintiff to pursue a paternity action against a putative father as tantamount to state pursuit of the action against the father).

Petitioner can only truly ensure that he prevents pregnancy and remains in full compliance with the probation condition by refraining from having sexual

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[2] *See Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983) (recognizing that it is "fundamentally unfair" to revoke probation and impose incarceration when the probationer has made "all reasonable efforts" to comply with the probation condition and yet cannot do so "through no fault of his own," and when there are "adequate alternative methods of punishing the defendant" available). The *Bearden* Court considered revocation of a defendant's probation for failure to pay a fine and make restitution, distinguishing that case from situations in which a probationer's inability to comply with a term of probation posed a threat to the safety or welfare of society, for example, by requiring a probationer to refrain from driving while intoxicated. *Id.* at 669 n.9. Having a child, like indigency, "is itself no threat to the safety or welfare of society," *id.*, but rather procreation has been recognized by this court as fundamental to the very survival and existence of humankind. *Skinner*, 316 U.S. at 541. Thus, revoking Petitioner's probation because his partner has a child as the result of an unintended pregnancy would be fundamentally unfair.

intercourse entirely, or by being sterilized.[3] The requirement of abstinence as a condition of probation, as well as the requirement that a probationer be sterilized, is simply inconsistent with this Court's privacy jurisprudence. *See generally Casey*, 505 U.S. at 851; *Skinner*, 316 U.S. at 541. Thus, there is no way in which Petitioner can comply with the no-procreation condition without suffering a significant intrusion into the most intimate and highly personal aspects of his life.

The Wisconsin court decision not only conflicts with the numerous other court decisions recognizing that conditions on probation which implicate a probationer's right to have children unquestionably infringe upon the right to privacy, *see* Petition for a *Writ of Certiorari*, at 19-20, but its attempt to distinguish the no-procreation condition from these types of restrictions conflict with this Court's precedent as well. Specifically, this Court has rejected the argument, accepted by the Wisconsin Supreme Court, *Oakley*, 629 N.W. 2d at 212, that a financial condition does not interfere with a fundamental right, here the right to have children, so long as an individual is allowed to exercise the fundamental right upon a showing of financial ability. In *Zablocki v. Redhail*, 434 U.S. 374

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[3] Male birth control is not 100% effective. For example, male latex condoms have an 86% effectiveness rate. Female contraception is typically not detectable, and, thus, Petitioner cannot be positive that his sexual partner is using birth control. Even where she does use contraception, however, many forms of female contraception, too, are not 100% effective. For example, diaphragms with spermicide have an 80% effectiveness rate, and oral contraceptives have a 95% effectiveness rate. *See* Tamar Nordenberg, U.S. Food and Drug Admin., *Protecting Against Unintended Pregnancy: A Guide to Contraceptive Choices* (June 2000) <http://www.fda.gov/fdac/features/1997/397_baby.html>.

(1978), the Court addressed the constitutionality of a Wisconsin statute that prohibited a state resident from marrying without court approval when the individual had minor children not in his or her custody that he or she was under court order to support. The Court noted that some individuals in the affected class will never be able to obtain the required court order allowing them to marry, "because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges." *Id.* at 387. Thus, these individuals were "absolutely prevented" from marrying. *Id.* So, too, here, as the court imposing the condition recognized that Petitioner will likely never be able to make the showing of financial ability required before Petitioner is allowed to have additional children. *See Oakley*, 629 N.W. 2d at 217. Moreover, even were Petitioner somehow able to meet the no-procreation condition, this Court has nevertheless held such a requirement to be a "serious intrusion" into the fundamental right to privacy. *Zablocki*, 434 U.S. at 387.[4]

Accordingly, the challenged probation condition, which ties Petitioner's right to have children to his financial ability and which is deemed violated upon the birth of a child which he fathers but cannot financially support, is a significant infringement on the fundamental right to privacy long-protected by this Court. The Wisconsin

[4] The Wisconsin court attempts to distinguish this case from *Zablocki* on the basis that *Zablocki* examined the constitutionality of a statutory classification, while this case concerns a condition imposed pursuant to a judge's discretion. *Oakley*, 629 N.W. 2d at 207-8, n.23. This justification, however, ignores this Court's concerns in *Troxel v. Granville*, 530 U.S. 57 (2000), that allowing broad judicial discretion in the privacy context raises significant concerns, as well. *Id.* at 67.

Supreme Court's failure to recognize this infringement flies in the face of this Court's privacy jurisprudence, and *amici* respectfully urge the Court to grant *certiorari* on this basis.

II. THE WISCONSIN SUPREME COURT'S DECISION UPHOLDING THE CHALLENGED PROBATION PROVISION ON THE BASIS THAT IT IS BOTH REASONABLY RELATED TO A LEGITIMATE INTEREST AND IS NARROWLY TAILORED TO ACHIEVE A COMPELLING INTEREST CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

In upholding the challenged probation condition, the Wisconsin Supreme Court purported to apply rational basis scrutiny, asserting that probation conditions are always subject to a standard of reasonableness even when they infringe upon a constitutional right. *Oakley*, 629 N.W. 2d at 207-10. Nevertheless, the court also held that the probation condition is narrowly tailored to the State's interests in having parents support their children and in rehabilitating Petitioner through probation rather than prison. *Id.* at 212. Both the Wisconsin Supreme Court's application of rational basis scrutiny and its assertion that the probation condition passes muster under strict scrutiny are in direct conflict with this Court's privacy jurisprudence.

A. Because The Probation Condition Imposes A Significant Infringement On The Right To Procreate, The Wisconsin Supreme Court Erred In Requiring The Condition To Pass Only Rational Basis Review

Consistent with its protection of the fundamental right to privacy in reproductive choice, this Court has long held that infringements on the right to procreate are subject to strict scrutiny. As this Court noted in *Carey*, "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." 431 U.S. at 686. *See also Skinner*, 316 U.S. at 541 (extending strict scrutiny to sterilization law because of the law's interference with the right to procreate). A direct burden on the right, such as that at issue here, is equivalent to a flat prohibition on the right for purposes of triggering strict scrutiny. *Carey*, 431 U.S. at 688. As Petitioner explains in his Petition for *Writ of Certiorari*, this Court recently made clear in *United States v. Knights*, 534 U.S. 112 (2001), that the standard does not change when the issue is whether a condition of probation infringes the right. *See* Petition for a *Writ of Certiorari*, at 12-18. Rather, when a federal constitutional right – here, the right to procreate – is infringed by a probation condition, the appropriate constitutional analysis still applies, simply informed by the defendant's probationer status. *See id.*

Here, too, strict scrutiny is necessary to guard against an infringement on the right to procreate. As shown *supra*, the challenged probation condition clearly and significantly interferes with Petitioner's right to procreate. Because the state court refused to apply heightened

review, *Oakley*, 629 N.W. 2d at 207-10, its decision contravenes this Court's clear pronouncements on the issue. *Amici* respectfully urge the Court to grant *certiorari* to clarify courts' obligation to subject such conditions to searching review.

B. The No-Procreation Condition Is Not Narrowly Tailored To Serve A Compelling Interest

Though refusing to subject the no-procreation condition to searching review, the Wisconsin Supreme Court nevertheless opined that the provision was, in fact, narrowly tailored to the State's interest in having parents support their children and in rehabilitating Petitioner through probation rather than prison. *Id.* at 212-13. This, too, conflicts with this Court's determination that conditions, like the one challenged here, fail strict scrutiny. Specifically, the Wisconsin Supreme Court's ruling directly conflicts with this Court's decision in *Zablocki*, 434 U.S. at 374, in which it held that a State could further legitimate interests, similar to those asserted here by the state, through numerous less intrusive alternative means.

In *Zablocki*, the state's asserted interests in prohibiting a state resident from marrying without court approval when the individual had minor children not in his or her custody that he or she was under court order to support included: (1) providing the opportunity to counsel individuals as to the necessity of fulfilling their child support obligations; and (2) otherwise protecting the welfare of out-of-custody children. *Id.* at 388. As this Court noted, however, there were other alternatives that would have vindicated these interests without unduly interfering with the petitioner's and his future sexual partner's fundamental rights. These alternatives included wage assignments,

civil contempt proceedings, and criminal penalties. *Id.* at 389-90. Significantly, and in contrast to less constitutionally suspect alternatives, the imposed condition would not have financially benefited his children, as was intended. *Id.* Furthermore, this Court noted that the prohibition on marriage was underinclusive, as it would not have prohibited the individual from accruing other debts. *Id.* at 390.

Likewise, the no-procreation condition is not narrowly tailored. Here, as in *Zablocki*, the condition is grossly underinclusive, as it "do[es] not limit in any way new financial commitments by the [petitioner] other than those arising" out of the birth of another child. *Id.* And, as in *Zablocki*, there are numerous other means available to ensure that Petitioner meets his financial obligations to his children. For example, as dissenting Justice Bradley noted, Wisconsin's law still provides for wage assignments, civil contempt proceedings, and criminal penalties. *Oakley*, 629 N.W. 2d at 218 (Bradley, J., dissenting). *See also* Wisc. Stat. Ann. §108.13(4)(c) (2001) (allowing for set off of unemployment insurance for payment of past due child support); Wisc. Stat. Ann. §767.303 (2001) (allowing for suspension of vehicle operating privileges when license holder is delinquent in child support payments); Wisc. Stat. Ann. §49.227 (2001) (allowing for publication of names and photographs of child support obligors); Wisc. Stat. Ann. §49.854 (2001) (allowing for liens against real and personal property as means of collecting delinquent child support payments); Wisc. Stat. Ann. §767.265 (2001) (allowing for wage assignments against child support obligors). *See also Bearden*, 461 U.S. at 670-72 (noting that courts have various means of exacting fines from indigent criminal defendants); *United States v. Smith*, 972 F.2d. 960, 962 (8th Cir. 1992) (recognizing that imposing a prison term for violating a condition of probation that prohibits defendant from fathering more children would be

counter productive to the state's interest in having the father support his children). Thus, the no-procreation condition clearly fails the strict scrutiny standard that requires narrowly tailored intrusive state action, and the Wisconsin court erred in stating that the condition meets the requirements of heightened scrutiny.

III. THE WISCONSIN SUPREME COURT'S DECISION WILL HAVE WIDE IMPACT ON THE FUNDAMENTAL PRIVACY RIGHTS OF VULNERABLE POPULATIONS AND MAY ENCOURAGE OPPROBRIOUS POPULATION CONTROL

The Wisconsin Supreme Court's decision threatens the reproductive rights of individuals who are particularly vulnerable to undue government interference. By applying a less exacting standard of review than strict scrutiny, the state court decision erodes this Court's long-standing protection for privacy rights and reproductive freedoms, substantially interfering with "a sensitive and important area of human rights." *Skinner*, 316 U.S. at 536.

Clearly, fathers, including noncustodial fathers, have an obligation to support their children. A number of federal and state laws attempt to facilitate and extract such financial support,[5] and the mechanisms available to the government in its efforts to obtain support payments are numerous, ranging from garnishing wages to

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[5] *See, e.g.*, 42 U.S.C. §654 (2002); Wisc. Stat. Ann. §49.19(4)(h)1.a. (2001).

rehabilitating delinquent obligors through incarceration.[6] In the instant case, however, the Wisconsin court employed a correctional tool that oversteps the bounds of what states can use as a valid instrument of rehabilitation: restricting individual reproductive freedoms based on economic means. The decision below raises an important federal question with enormous implications for many vulnerable populations, including jeopardizing the reproductive freedoms of individuals with limited economic means as well as those subject to probation and in the process of transitioning back into the community. Moreover, the court's approval of the no-procreation condition opens the door to potential judicial and governmental experimentation with extreme and opprobrious population control.

The Wisconsin Supreme Court's decision upholding the probation condition sanctions an unconstitutional economic means test for parenting and exercising reproductive choice rights, jeopardizing the parenting and privacy rights of low-income individuals. The condition challenged here is an explicit credit check on Petitioner's exercise of the fundamental right to procreate; it prohibits Petitioner from "hav[ing] any more children unless he demonstrates that he ha[s] the ability to support them and that he is supporting the children he already ha[s]."

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[6] The efficacy of these various policies has been the subject of considerable study and debate. *See* Michelle Ganow Jones, *Child Support Issues in Welfare Reform Reauthorization*, TANF Reauthorization Resources, The Welfare Info. Network (May 2002) <http://www.welfareinfo.org/childsupportissuestanfreauth_trn.htm>; Elaine Sorensen & Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, The Urban Inst. (Apr. 2002) <http://www.urban.org/UploadedPDF/410477.pdf>.

Oakley, 629 N.W. 2d at 203.[7] The no-procreation condition's explicit economic means test, if replicated, could have far-reaching consequences, putting the privacy and reproductive choice rights of many other low-income individuals, including welfare recipients and the unemployed, at risk. Indeed, Petitioner's facts are not as "atypical" as the state court majority suggested. *Id.* at 214. There are approximately two and a half million poor noncustodial fathers who do not pay child support.[8] Incarceration, disability, lack of education, high unemployment and limited work history are among the factors that may be beyond an individual's control and that may reduce any parent's earning potential and therefore his or her ability to meet child support obligations.

Additionally, upholding the no-procreation condition jeopardizes the privacy and procreation rights of the thousands of individuals within the jurisdiction of Wisconsin's probation and parole system, and, if adopted in other states, millions nationwide.[9] Accordingly, the decision

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[7] The condition also rests on a gender-based assumption that Petitioner will be solely responsible for the support of any future children. It prohibits additional children even if the mother would be able to support them independently. Moreover, it ignores the non-economic contributions that a noncustodial father provides for his children.

[8] *See* Elaine Sorensen, The Urban Institute, *Child Support and Fatherhood Proposals: Testimony before the United States House of Representatives, Subcommittee on Human Resources, Committee on Ways and Means* (June 28, 2001) <http://www.urban.org/TESTIMON/Sorensen_06-28-01.html>.

[9] The U.S. Department of Justice reported that in Wisconsin, in the year 2000, approximately 54,000 people were subject to probation, and approximately 9,000 were subject to parole. Over four million

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implicates far more than just the privacy rights of Petitioner; it establishes a principle that opens the door to potential government intrusions into the fundamental right to procreate of many others emerging from the criminal justice system.

Moreover, the no-procreation condition reaches beyond Petitioner's interests; it also interferes with the privacy rights of his family, and should the condition be replicated, the families of others like him. As discussed *supra*, because Petitioner will be subject to incarceration if his sexual partner bears his child during his probation period, this criminal sanction also places an undue and substantial burden on his partner and her decision whether or not to bear his child. The legal sanction here is not designed to persuade; it is an obstacle specifically designed to hinder free choice. *See Casey*, 505 U.S. at 877 (plurality opinion) (reviewing provisions of Pennsylvania Abortion Control Act under undue burden analysis). The impact of this criminal sanction on Petitioner's partner in such a case will be substantial. Given their intimate relationship, the threat of her partner's incarceration will unduly burden her decision.[10] Additionally, pressure that a probationer,

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individuals were either on probation or parole nationally in 2000 (3,839,532 on probation and 725,527 on parole). *See* U.S. Dep't of Justice, *Nat'l Correctional Population Reaches New High, Grows by 126,400 during 2000 to Total 6.5 Million Adults* (Aug. 28, 2001) <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus00.pdf>.

[10] Incarcerating a woman's partner or husband, as a consequence of her decision whether or not to bear his child, clearly burdens her decision and amounts to government coercion. Married or not, her intentions regarding her pregnancy will be substantially encumbered by the additional consequence of her partner's incarceration. Recent reports from the Fragile Families and Child Wellbeing Study conducted by Princeton and Columbia Universities indicate that the vast majority

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who is subject to imprisonment should his partner bear his child, might place upon his partner regarding the pregnancy would be directly attributable to the state and would constitute an unconstitutional burden. *Cf. Casey*, 505 U.S. at 897 (finding that state-created risks of private cajoling and violence by the man imposed undue burden on the woman). Because Petitioner's partner may not be in a position to challenge the condition, as she is not the one subject to incarceration, Petitioner's present challenge to the no-procreation condition also protects his partner's reproductive choice rights. *Cf. Powers v. Ohio*, 499 U.S. 400 (1991) (recognizing the rights of litigants to bring actions on behalf of third parties in case where non-minority criminal defendant asserted equal protection rights of minority jurors); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (according standing to private schools asserting the privacy and parenting rights of parents who would be subject to prosecution for sending their children to private school).

Moreover, the state court decision permits a form of government administered population control. Notwithstanding *Buck v. Bell*, 274 U.S. 200 (1927),[11] this Court has

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of unmarried parents are committed to a relationship with each other and their child at the time the child is born. Sara McLanahan, *et al.*, The Brookings Institution, *Fragile Families, Welfare Reform, and Marriage*, Policy Brief No. 10, 2 (Nov. 2001) <http://www.brook.edu/dybdocroot/wrb/publications/pb/pb10.pdf>. Additionally, 93% of single mothers studied in the Fragile Families and Child Wellbeing Project reported wanting the father involved in raising their child. Brandheim-Thoman Ctr. for Research on Child Wellbeing, *Dispelling Myths About Unmarried Fathers*, Fragile Families Research Brief (May 2000) <http://www.crcw.princeton.edu/CRCW/papers/ researchbrief1.pdf>.

[11] In *Buck v. Bell*, the Court upheld a state statute permitting sterilization of so-called feeble-minded individuals. On May 2, 2002, the

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been wary of such government actions. For example, in *Skinner,* this Court expressed its view "that strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals." 316 U.S. at 541. Likewise, in *Casey*, the Court articulated a concern regarding the possibility of eugenics: "[i]f indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." 505 U.S. at 859.

This Court's vigil against population control is informed by this country's significant history of experimentation with eugenic population control,[12] such history which is echoed in the condition ordered by the trial judge below.[13] For example, the "model sterilization law," the

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seventy-fifth anniversary of the *Buck v. Bell* decision, the State of Virginia formally apologized for the government's role in sterilizing approximately 8000 people under the state's law, which was based on the "model eugenical sterilization law." *See* William Branigin, *Va. Apologizes to the Victims of Sterilizations*, Wash. Post, May 3, 2002, at B1. Carrie Buck was the first person sterilized under the law; research indicates that she was not "feeble-minded," rather she was of normal intelligence, but poor and uneducated. *See* Stephen J. Gould, *The Flamingo's Smile* 306-18 (1985); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U.L. Rev. 30 (1985).

[12] By 1931, at least thirty states had enacted sterilization laws. *See* Michael Ollove, *The Lessons of Lynchburg*, The Baltimore Sun, May 6, 2001, at 7F; Gould, *supra,* at 307-09.

[13] The trial judge stated: "But seven children . . . that's expensive. . . . And you know and I know you're probably never going to make 75 or 100 thousand dollars a year. You're going to struggle to make 25 or 30. . . . I know that that's going to be tough and I think it should

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source for most of the sterilization laws passed in America, including the one at issue in *Buck v. Bell,* also served as the model for the eugenic sterilization program of Nazi Germany.[14] Under the Virginia law at issue in *Buck v. Bell*, many individuals were sterilized who were not "feeble-minded" but rather were indigent and poorly educated, characteristics shared by others at risk of no-procreation conditions similar to Petitioner's, given the principles upheld by the majority below.[15] A history of state sponsored coercive sterilization programs and sterilization abuse of certain populations, including Black, Puerto Rican, Native American, Mexican-American as well as incarcerated women, further demonstrates the need for heightened scrutiny in this case.[16]

The no-procreation condition imposed on Petitioner here, and subject only to rational basis review, then, opens the door to a means of population control that this Court has sought to protect against. While the Wisconsin majority attempted to distinguish petitioner's no-procreation condition from those ordered by judges who impose conditions "that reflect their own idiosyncrasies," the rational basis review inappropriately used by the state court is simply insufficiently stringent to protect individuals from government overreaching. *Oakley,* 629 N.W. 2d at 206.

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come to an end unless you really can demonstrate that you can support . . . more children." *See* Jan. 13, 1999 Trans. at 30-31.

[14] *See* Gould, *supra*, at 309.

[15] *See* Ollove, *supra,* at 7F.

[16] *See* Rosalind Pollack Petchesky, *Abortion and Woman's Choice* 179-81 (1984); Helen Rodrigues-Triaz, *Sterilization Abuse, in Biological Woman – The Convenient Myth,* 147-51 (Ruth Hubbard *et al.* eds. 1982).

Thus, the ramifications of the Wisconsin Supreme Court's decision affirming the no-procreation probation condition imposed on Petitioner are potentially much more extensive than acknowledged by the state court and significantly jeopardize the privacy and procreation rights of individuals while conflicting with the settled jurisprudence of this Court. For these reasons, *amici* respectfully urge the Court to grant *certiorari* to clarify the important question presented.

CONCLUSION

For the reasons set forth *supra*, and for those set forth in the Petition for *Writ of Certiorari*, *amici* respectfully urge this Court to grant *certiorari* in this case.

Respectfully submitted,

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APPENDIX A:

STATEMENTS OF INTEREST OF INDIVIDUAL *AMICUS CURIAE*

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for thirty years. NOW Legal Defense has a long-standing commitment to economic and social justice and to securing reproductive rights for all, regardless of economic means. The NOW Legal Defense Fund's litigation and education docket primarily focuses on the rights of welfare recipients, discrimination in employment and training, the employment and housing rights of victims of violence, and ensuring that the reproductive and marriage choices of women are free from government intrusion.

The National Partnership for Women & Families

The National Partnership for Women & Families, founded as the Women's Legal Defense Fund in 1971, is a non-partisan, non-profit advocacy group that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership firmly believes that reproductive choice must never be tied to economic means. The National Partnership has a long history of promoting and defending a woman's right to choose by filing *amicus curiae* briefs on major reproductive rights and health issues.

National Advocates for Pregnant Women

The National Advocates for Pregnant Women (NAPW) is a non-profit organization dedicated to securing the human and civil rights, health and welfare of pregnant and parenting women, and furthering the interests of their families. NAPW seeks to ensure that the fundamental human capacity for procreation is not used by government authorities as a mechanism for controlling or punishing certain individuals or groups. In our view, reproductive decisions cannot be blamed for poverty or other social ills, and we do not believe that government control of such decisions provides the solution to these problems.

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc. (PPFA), a not-for-profit corporation organized in 1922, is the leading national voluntary health organization in the field of family planning. PPFA has 127 affiliates in 49 states and the District of Columbia, operating approximately 875 health centers. In addition, in many states, Planned Parenthood affiliates have separate organizations that provide them with public affairs and lobbying support at the state level. PPFA is committed to promoting and preserving full reproductive choice for all people, and to providing access to high quality, confidential, reproductive health services.

Center for Reproductive Law & Policy

The Center for Reproductive Law & Policy (CRLP), founded in 1992, is a non-partisan, non-profit group that uses advocacy both domestically and internationally to ensure access to reproductive rights for all people. CRLP

has either represented directly or filed *amicus curiae* briefs in every major case involving reproductive rights and health issues before the United States Supreme Court since 1992.

Choice USA

Choice USA is a national pro-choice organization, which gives emerging leaders the tools they need to organize, network, and exchange ideas to build a youth-centered pro-choice agenda and mobilize communities for reproductive freedom. Choice USA is dedicated to the right of each person worldwide to decide when and if they will have sex, when and if they will be pregnant, and when and if they will have a child. In order to make those personal decisions, accurate information and safe, legal reproductive heath services must be available to everyone.

National Center for Human Rights Education

The National Center for Human Rights Education (NCHRE) is a national training and resource service center for social justice activists in communities and schools. Its mission is to build a human rights movement in the United States by training community leaders and student activists to apply human rights standards to issues of injustice in the United States. NCHRE joins this *amicus* brief because it believes that the decision of the Wisconsin State Supreme court sets a dangerous precedent for government interference in private reproductive decisions.

SisterSong Women of Color Reproductive Health Collective

The SisterSong Women of Color Reproductive Health Collective is a network of local, regional and national grassroots agencies representing four primary ethnic populations/indigenous nations in the United States: Native American/Indigenous, Black/African American, Latina/Puerto Rican, and Asian/Pacific Islander. The Collective was formed in 1997 to educate women of color and policy makers on reproductive and sexual health and rights, and to work towards the access of health services, information and resources that are culturally and linguistically appropriate. We achieve these goals through public policy work, advocacy, service delivery and health education within our communities on the local, national and international levels. As women of color reproductive health organizations, we believe that the Wisconsin Supreme Court erred in granting the state the power to predetermine who should be allowed to reproduce and bear children, and that this decision echoes earlier rationales for race and class-based eugenics popular in the beginning of the 20th century. SisterSong Collective represents many women who have experienced state-directed intervention with our decisions to bear children through sterilization abuse, unsafe medical and clinical trials, and health care disparities.

Women's Economic Agenda Project (WEAP)

The Women's Economic Agenda Project (WEAP) is a nonprofit organization established in 1982 in California by and for low-income women. Our focus is on the elimination of poverty and the creation of economic security for poor women and their families through community organizing,

leadership development, and policy work. WEAP's decades-long policy work against the criminalization of poor people shows our continued commitment to securing economic human rights for every resident of the United States.

(5)

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IN THE

Supreme Court of the United States

David W. Oakley,
Petitioner,

v.

State of Wisconsin.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The trial judge in this case forbade petitioner from procreating unless and until he first pays, as child support, money he does not have and that he will not have in the future. Although respondent opines that the lower courts did not "limit Oakley's right to procreate nearly as much" as their opinions state because he is merely subject to a probation "condition" (BIO 5) that is set to expire five years hence and that he might even meet (say, if he wins the lottery), here and now petitioner will indisputably go to jail if he fathers a child. Such a prohibition on procreation is a matter of black and white, not nuance, for petitioner can no more procreate "more or less" than his partner can be "a little bit" pregnant. This case accordingly presents an important question regarding one of our most basic rights. And the Wisconsin Supreme Court's decision refusing to apply strict scrutiny and sustaining the no-procreation condition conflicts with precedents of this Court and other courts in both methodology and in result.

By far, the most important element of the Wisconsin Supreme Court's reasoning is so plainly erroneous that even respondent disclaims it. The majority below opined that the state's power to incarcerate petitioner, which would incidentally impinge on his ability to procreate, implies the power to restrict his right to procreate while on probation. See Pet. App. 18a-19a. The Petition having demonstrated the fallacy of that "greater includes the lesser" syllogism (Pet. 24-25), respondent openly abandons the view that "a court can impose a probation condition impinging on procreative rights in any case where the court could have sentenced the criminal defendant to prison" (BIO 18). But with this leg knocked out from under the decision below, nothing of substance remains to support its conclusion that the probation condition in this case represents only an insignificant infringement on petitioner's right to procreate.

Certiorari accordingly should be granted.

I. Certiorari Should Be Granted To Resolve The Conflict Over The Scrutiny Applicable To Probation Conditions Restricting Procreation.

Much of the brief in opposition turns on respondent's misguided attempt to recharacterize the decision below as involving only petitioner's volition: supposedly, like a lightbulb, petitioner can switch on and off his own right to have a child merely by paying as support what little money he has available. *E.g.*, BIO 7. If he has essentially no money, he is subject to no restriction. That simply is not correct: it could not be clearer that petitioner may have a child only if he first shows that he is *actually supporting* his existing children and that he *can support* another child: "the requirement is that Oakley acknowledge the requirements of the law and support his present and any future children." Pet. App. 23a. The condition is not merely that petitioner *wants* to support them, but that "he *can* support" them (*id.* 5a-6a (emphasis added)) and has "the *ability* to support" them (*id.* 8a (emphasis added)). Although respondent does not even attempt to cite or quote any language from the opinion below to support his contrary reading, presumably respondent is relying on footnotes 28 and 29, which address the separate issues of the circumstances that "led to the probation condition" in the first place (*id.* 23a n.28) and thus that describe the steps petitioner must take in order to "stay within the conditions of his parole" so that he is not re-incarcerated for, once again, failing to pay child support (*id.* 23a n.29).

It would make no difference even if the trial judge had imposed, and the Wisconsin Supreme Court had sustained, the narrower probation condition respondent imagines. Time and again, this Court has recognized the profound and fundamental nature of the right at stake in this case. Procreation "is at the very heart" of the rights protected by the Constitution, for it "by definition concerns the most intimate of human activities and relationships" (*Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977)), such that it may be abrogated only on the most extraordinary showing. See generally Pet. 14-18. Without gainsaying the seriousness of a willful refusal to pay child support, more would be required to prohibit petitioner from

having a child, particularly when (as in this case) the refusal to pay spans only *four months* and when the state indisputably has other means at its disposal to advance its interests. Particularly in these circumstances, a "'collection device' rationale cannot justify [such a] broad infringement" on the right to procreate. *Zablocki* v. *Redhail*, 434 U.S. 374, 389 (1978).[1]

The Wisconsin Supreme Court nonetheless repeatedly and avowedly held that this unambiguous restriction on petitioner's right to procreate is not subject to strict scrutiny. *E.g.*, Pet. App. 15a & n.23 ("probation conditions--like prison regulations--are not subject to strict scrutiny analysis"); *id.* 22a & n.27 (expressly rejecting dissent's application of strict scrutiny). Respondent's contention that the Wisconsin Supreme Court nonetheless applied some sort of "heightened" scrutiny in this case (BIO 8-9) overreads the Court's statement that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation" (Pet. App. 19a) (quoting *Edwards* v. *State*, 246 N.W.2d 109 (Wis. 1976)). The reasonably related standard applies by statute to *every* probation condition. Wis. Stat. § 973.09(1)(a). The court below furthermore emphasized that state law "grants a circuit judge broad discretion in fashioning a convicted individual's conditions of probation." Pet. App. 12a.

The Wisconsin Supreme Court's statement that the probation condition in this case is not "overly broad" (Pet. App. 22a-23a) thus does not *remotely* approximate the holding of other courts that conditions limiting procreation must be "especially fine-tuned" (*United States* v. *Smith*, 972 F.2d 960, 961 (CA8 1992) (quoting *United States* v. *Tolla*, 781 F.2d 29, 34 (CA2 1986))), "narrowly drawn," and "subjected to special scrutiny" (*People* v. *Pointer*, 199 Cal. Rptr. 357, 365 (App. 1984)), because "decisions regarding conception lie within the sphere of choices protected by constitutional rights to privacy" (*State* v. *Mosburg*, 768 P.2d 313, 314 (Kan. App. 1989)).

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[1] Nor, of course, may the government impose a punishment that abrogates a fundamental constitutional right with the *ipse dixit* that the punishment never comes into play if the defendant follows the law.

Rather, the Wisconsin Supreme Court found it sufficient that the condition in this case "does not *eliminate* Oakley's ability to exercise his constitutional right to procreate" (Pet. App. 22a (emphasis added), *quoted in* BIO 5) – and found it sufficient without identifying any special facts suggesting that the condition in this case *was* "narrowly tailored" to achieve a compelling state interest. Notably, respondent does not contest the Petition's showing (at 26-27 & n.18) that many thousands of individuals in this country have indistinguishable child support arrearages. See also *infra* at 6 (detailing conflict with *Zablocki* v. *Redhail*, 434 U.S. 374 (1978)). Respondent's bald assertions that the decision below "is consistent" with these decisions and that "there is little substantive difference in the articulated standards" (BIO 10) are, literally, empty.

The Petition also demonstrated that the lenient standard adopted by the majority below conflicts with this Court's decision in *United States* v. *Knights*, 534 U.S. 112, 122 S. Ct. 587 (2001). Respondent's claim that "*Knights* does not articulate the applicable standard to be applied when addressing whether a probation condition that impinges on a constitution [sic] right is valid" (BIO 11) is wrong: *Knights* holds that there is no special constitutional standard for the probation context. That case, of course, involved the validity of a search under the Fourth Amendment, which calls for an inquiry into the search's "reasonableness" in the "'totality of the circumstances'" (122 S. Ct. at 591 (quoting *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996))); the fact that the case involved a search of a probationer enhanced the state's interest in avoiding criminal activity and reduced the defendant's expectation of privacy. See Pet. 12-14. The fact that the condition in that case was valid as a matter of state law (BIO 12) did not answer the constitutional question. Rather, as respondent is forced to concede (*id.*), *Knights* holds that the probation context simply informs the totality of circumstances; it does not change the applicable legal standard. In this case, by contrast, the Wisconsin Supreme Court avowedly *refused* to apply the standard governing restrictions on the right to procreate, which "may be justified only by a 'compelling state interest' * * * and * * * must be narrowly

drawn to express only the legitimate state interests at stake" (*Carey*, 431 U.S. at 688 (alterations in original)).

Nor is there merit to respondent's suggestion that a more lenient constitutional standard applies in the probation context because probation conditions "appl[y] only to one convicted felon, and not to a broad group of law-abiding citizens." BIO 16. As the Petition explained (at 15-16), but respondent ignores, the fact that probation conditions are imposed pursuant to a trial judge's broad discretion rather than any specific statutory directive (BIO 15-16) renders the restriction on petitioner's right to procreate *more*, not *less*, suspect, for it invites uneven application and invidious discrimination. The further fact that the condition is not expressly directed or authorized by statute (whether in Wisconsin or in any other state) undercuts popular accountability, reduces political checks on abuse, and casts serious doubt on the suggestion that it furthers an important governmental interest.

II. Certiorari Should Be Granted To Resolve The Conflict Over Whether A Probation Condition Restricting Procreation Is Narrowly Tailored To Further A Compelling State Interest.

There could not be less merit to respondent's contention (BIO 13-14) that the decision below does not merit certiorari because other courts have invoked only statutory grounds to strike down probation conditions restricting procreation. Courts have repeatedly found such conditions to be violative of the Fourteenth Amendment.[2] Further, under both state and federal law, the statutory "reasonableness" inquiry is *less* stringent (substantially so) than the Fourteenth Amendment "strict scrutiny" regime. Yet every other court but one has *invalidated* similar probation conditions. See Pet. 10, 18-20 (citing, *inter alia*, *People* v. *Pointer*, 199 Cal. Rptr. 357 (App. 1984); *State* v. *Mosburg*, 768 P.2d 313 (Kan. App. 1989)). A constitutional challenge will *a fortiori* succeed in each of the courts respondent

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[2] See, *e.g.*, *Trammell* v. *State*, 751 N.E.2d 283 (Ind. App. 2001); *State* v. *Mosburg*, 768 P.2d 313 (Kan. App. 1989); *People* v. *Pointer*, 199 Cal. Rptr. 357 (App. 1984).

cites, which in any event rely on constitutional principles. See, *e.g.*, *United States* v. *Smith*, 972 F.2d 960, 962 (CA8 1992) (invoking federal constitutional concerns in its analysis overturning the condition (citing *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942)). The observation that "[e]ach case involving a challenge to a probation condition requires a fact-specific analysis" (BIO 14) not only ignores the conflict over the applicable standard of scrutiny but also overlooks the fact that, whatever standard is applied, other courts have rejected less egregious conditions restricting procreation on less extreme facts and thus would necessarily reject the condition in this case. See Pet. 18-21. Indeed, respondent's statement that "none of these cases presented facts comparable to the present case" (BIO 14) is but a backhanded acknowledgement that this case presents nothing remotely comparable to the instances of child abuse and endangerment that other courts have deemed insufficient to limit procreation.

The decision below also conflicts with *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), which the Wisconsin Supreme Court refused to follow for "the simple reason that the test in *Zablocki* was * * * strict scrutiny" (Pet. App. 16a n.23). Just as in *Zablocki*, the probation condition in this case interferes with the exercise of a fundamental right "without delivering any money at all into the hands of the applicant's prior children." 434 U.S. at 389. Although *Zablocki* details numerous other means to ensure compliance with support orders, the state here did not propose and the trial judge did not consider even such obvious alternatives as requiring petitioner to hold down two full-time jobs. The fact that the state has subjected petitioner to *some* work requirements (particularly requiring him to maintain a job and subjecting him to wage assignments) simply proves petitioner's point: the state-law lien on petitioner's wages already assures that any income he receives will go to support his children.

Indeed, respondent's argument only emphasizes the conflict with *Zablocki*. Respondent contends that, if petitioner intentionally fails to pay his child support obligations, "he will be separately violating a different condition of probation,

requiring that he not commit any crime" (BIO 7), such that the state will then be able to imprison him. That is precisely right, and that very fact renders the prohibition on petitioner's procreation a gratuitous and wholly ineffective restriction on a fundamental constitutional right. The condition's *only* force and effect is to require that, if petitioner *does* have another child without first demonstrating under a wholly uncertain standard that he can support his former children and any new child, he will be sent to jail.[3] The result is to impinge upon his exercise of a basic right for fear of imprisonment and to create the related, horrific prospect that the woman carrying his child will abort for fear of sending petitioner to jail and depriving her newborn of whatever emotional or meager economic support that a working father might be able to provide.

III. This Case Is An Ideal Vehicle To Decide The Question Presented.

The Petition demonstrated (at 27-30), and respondent conspicuously does not dispute, that probation conditions like the one in this case are frequently imposed but rarely appealed because defendants fear that they will be imprisoned if the condition is overturned. Accord Pet. App. 17a n.24 (acknowledging this fact and deriding defendants for lacking sufficient "mettle"). That said, when defendants do appeal they generally prevail in the intermediate state courts and the state either declines to appeal or the state supreme court declines review (as in *People* v. *Pointer*, 199 Cal. Rptr. 357 (App. 1984) (pet. for hrg. in California Supreme Court denied (Apr. 26, 1984))). In conflict with the decision below, the law is accordingly settled in other states that such conditions are subject to strict scrutiny and are invalid. This case accordingly

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[3] The indeterminacy of the standard for revoking petitioner's probation and sending him to jail upon the birth of a child is magnified by the fact that the state is held only to a "preponderance" of the evidence, not proof "beyond a reasonable doubt," in the revocation context. *State ex rel. Flowers* v. *Department of Health & Human Servs.*, 81 Wis. 2d 376, 388 (1978).

presents a rare opportunity for this Court to resolve the important question presented. Contra BIO 8.

Respondent contends that this case is an inappropriate vehicle to decide the question presented because there is no "appellate record" on whether petitioner "was unemployed, impoverished, or unable to obtain employment from January through April of 1998." BIO 1. But those facts are immaterial. The case comes to this Court with petitioner having pleaded guilty of intentionally refusing to pay child support for four months. Petitioner's point is that such a conviction is simply insufficient as a constitutional matter to justify abrogating his right to procreate.[4]

Respondent otherwise misrepresents the record, and seriously so.

First, there manifestly *is* undisputed evidence demonstrating petitioner's substantial compliance with his child support obligations. Contra BIO 2. All of the payment records are official government records subject to judicial notice at any stage of the proceedings (*State* v. *Wachsmuth*, 243 N.W.2d 410, 417 (Wis. 1976); *State ex rel. Martin* v. *Barrett*, 248 Wis. 621, 630 (1946)), and petitioner properly presented them to the Wisconsin Supreme Court, where "[t]he State [did] *not* challenge [petitioner's] statement of the facts about his support payments." Pet. App. 3a (opinion of Abrahamson, C.J.) (emphasis added). In this case, respondent similarly does not dispute the contents of those state records.

Second, petitioner did not "quit [his] employment" after he "was released from custody" (contra BIO 1), a claim that in any event does not affect the question presented. The child support arrearages in this case arose immediately after petitioner's release from prison in December 1997. The BIO cites (but neglects to quote or discuss) a child-support official's testimony

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[4] In any event, to the extent there are any gaps in the record regarding the particulars of petitioner's employment (BIO 1), they reflect the total failure of the state and the trial judge to establish the necessary factual foundation for such an extraordinary restriction of a fundamental right.

that she was "assuming" petitioner's job "terminated" after his "*Huber* privileges" – *i.e.*, the state work release program – ended upon his release. 6/16/98 Tr. 18 (emphasis added). Under state law, because the *Huber* program involves the "employment of county jail *prisoners*" (Wis. Stat. § 303.08(1) (emphasis added)), petitioner lost the job upon his release and his return to his home in another part of the state. It was only at that point that petitioner had no money and "quit paying child support" (BIO 1).[5]

Third, the trial judge *did* recognize that it would be impossible for petitioner to satisfy the child support orders in this case, meaning that he could never satisfy the probation condition. Contra BIO 4. Although it is true that the judge raised the possibility that state law would permit Oakley to apply at a later date to have his support obligations reduced (*id.*), the record citations that respondent offers, but again does not quote or discuss, only *reinforce* the point that even the trial judge recognized that the condition in this case, on the facts as they now stand, prohibits petitioner from having children. 1/13/99 Tr. 23 ("Looking at the orders, it's pretty obvious, and taking into consideration Mr. Oakley's skill, the orders were more than he could afford to pay"); *id.* 24 ("overall it would appear to me that the amounts he's being expected to pay on a weekly basis is [sic] probably more than he could afford to

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[5] In a footnote, respondent asserts that, although a charge against petitioner for child abuse was *dismissed*, it was "read in" against him. BIO 2 n.2 This argument is irrelevant because the Wisconsin Supreme Court did not find that petitioner's prior convictions unrelated to child support nonpayment justified abrogating his right to procreate. That is not surprising, for the so-called "child abuse" was, in its *entirety*, knocking into the son of a person with whom petitioner was arguing, causing the son to suffer a "bump to the top of his head." *State* v. *Oakley*, #97-0021-471, Complaint 1 (6/24/97). Furthermore, as the very case respondent cites explains, the "read in" procedure means that "the defendant does not plead to any charges" but the underlying facts of the charges are simply "considered in sentencing." *Robinson* v. *City of W. Allis*, 619 N.W.2d 692, 702 (Wis. 2000) (quoting *Austin* v. *State*, 183 N.W.2d 56, 58 (Wis. 1971)). Nothing about these events presented a substantial risk that petitioner's sentence would be enhanced.

pay"); *id.* 29 (in any attempt to have the amounts changed, "[i]t may be the judge won't agree with you, maybe the judge will"). The judge simply decided that "a line has to be drawn" (*id.* 25) and that the condition was beneficial because "there's a message that gets sent out to people," including "a lot of people in [petitioner's] situation" (*id.* 25-26). And if that meant "trampling all over [petitioner's] constitutional rights, so be it." *Id.* 30.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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